Supreme Court, U.S.
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03-44

No.

In the Supreme Court of the United States

Basim Omar Sabri,

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 18 U.S.C. § 666 criminalize acts of bribery lacking a nexus to a federal interest and, if so, is the statute in that respect a constitutional exercise of Congress's powers?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Basim Omar Sabri respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 326 F.3d 937 (8th Cir. 2003). (Pet. App. A-1) The decision of the District Court is reported at 183 F.Supp. 2d 1145 (D.Minn 2002). (Pet. App. A-37)

JURISDICTION

Jurisdiction to review on a writ of certiorari the opinion in question is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Spending Clause of Article 1, Section 8 of the United States Constitution provides "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."

2. The Necessary and Proper Clause of Article 1, Section 8, cl. 18 of the United States Constitution provides "[t]he Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution" all the powers vested in the Government of the United States.

3. 18 U.S.C. § 666 (2000) states:

(a) Whoever, if the circumstance described in subsection (b) of this section exists-

....

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

STATEMENT

This case presents a recurring question of fundamental importance to the relationship between the states and the federal government which this Court previously left open and which has intractably divided the courts of appeals. The United States charged petitioner Basim Omar Sabri with bribery under 18 U.S.C. § 666. The court of appeals held that the government need not prove that the acts of bribery implicated any federal program. Rather, the court of appeals deemed it sufficient that the supposed target of the alleged bribe was a member of the Minneapolis City Council, an entity that – like essentially every state and local governmental entity in the nation – receives federal funding.

The district court dismissed the indictment on the ground that the charges exceeded Congress's powers. Pet.

App. A-37-A-62. A divided panel of the Eighth Circuit reversed. *Id.* A-1-A-36. The court of appeals – agreeing with the Fourth, Fifth, and Sixth Circuits but expressly rejecting the contrary view of the Second and Third Circuits – held that the statute neither requires the government to allege a nexus between the alleged bribe and any federal program nor exceeds Congress's powers. *Id.* A-13-14, A-28.

1. The general federal bribery statute, 18 U.S.C. § 666, is entitled, "Theft or bribery concerning programs that receive federal funds." As applicable to this case, Section 666 makes it a crime to "corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward an agent of" a local government "in connection with any business, transaction, or series of transactions" of such government.

Minnesota (like every state) similarly proscribes bribery. See, *e.g.*, Minn. Stat. § 609.42.

2. Petitioner is a Minneapolis property developer and real estate developer. Pet. App. A-64. During 2001, petitioner pursued a revitalization project for Minneapolis's Eighth Ward that proposed the construction of a new hotel, as well as various other new commercial construction.

In August 2001, the federal government charged petitioner with supposedly bribing Brian Herron, who was then the representative of the Eighth Ward and a member of the Board of Commissioners overseeing the Minneapolis Community Development Agency ("MCDA"). Specifically, the three-count indictment alleges (and petitioner denies) that, in July 2001, petitioner corruptly sought Herron's assistance with respect to the revitalization project in securing regulatory approvals, in negotiating with private business owners, and in obtaining development grants. See Pet. App. A-63-A-64 (reproducing the indictment). The indictment nowhere explicitly alleges a nexus between the alleged bribery and any federal program. Indeed, the first two counts merely rest on the fact that

Herron "was an agent of the City of Minneapolis and the MCDA" *Id.* A-64-A-65.

3. The district court granted petitioner's motion to dismiss the indictment. Pet. App. A-37-A-62. The court agreed with the government that, as a statutory matter, Section 666 does not require the indictment to allege a relationship between the bribe and any federally funded program. *Id.* A-41. The court expressly rejected the contrary holdings of the Second and Third Circuits: "This Court is not persuaded by these two appellate court decisions, which read a 'connection' requirement into the essential elements of a charge under § 666." *Id.* A-52. Because "the statute does not require proof of such a connection in order for the government to establish that a crime, as defined in § 666, has been committed," the district court deemed "irrelevant" the government's assertion that, notwithstanding the absence of any allegation of a nexus to federal funds in the indictment, it supposedly could produce evidence that "could establish a connection between the bribes allegedly offered by Sabri and the expenditure of federal funds." *Id.* A-53 n.9.

The district court next agreed with petitioner that the statute is unconstitutional because, without any direct nexus between the alleged criminal conduct and any federal expenditures or other federal interests, it exceeds Congress's power under the Spending Clause. The court explained that "Section 666 is plainly distinguishable from other criminal statutes containing an 'express jurisdictional element'; section 666(b) does not directly link a defendant's wrongdoing to the subject over which Congress has power – the expenditure of federal funds." Pet. App. A-55. Nor could the statute be sustained as a "condition" on the receipt of federal funds: it does not "condition a state or local government, or government agency's, receipt of federal funds"; nor does it even "apply to the recipient government or organization; it applies to the 'agents' of the recipient and private parties." *Id.*

4. On the government's appeal, a divided panel of the Eighth Circuit reversed. Pet. App. A1-A-36.

a. The panel agreed with the district court that Section 666 does not require the government to allege and prove a nexus between the alleged bribery and a federal interest beyond "proof that the relevant government organization, government, or agency received benefits under a federal program in excess of $10,000 in any one-year period." *Id.* A-4. In the court of appeals' view, the statute contains "no qualification that the prohibited conduct must have some relation to federal funds." *Id.* A-8.

The panel recognized that this Court had left the issue of a required nexus open in *Salinas* v. *United States*, 522 U.S. 52, 59 (1997), which explained: "We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves." But the Eighth Circuit joined the Fifth, Sixth, and Seventh Circuits in agreeing with the government that Section 666 requires no nexus to a federal program. Pet. App. A-14 (citing *United States* v. *Dakota*, 197 F.3d 821 (6th Cir. 1999); *United States* v. *Grossi*, 143 F.3d 348 (7th Cir. 1998), *cert. denied*, 525 U.S. 879 (1998); *United States* v. *Westmoreland*, 841 F.2d 572 (5th Cir. 1988), *cert. denied*, 488 U.S. 820 (1988)). The court "respectfully disagree[d]" with the contrary holdings of the Second and Third Circuits, as well as a panel ruling of the Sixth Circuit questioning that court's prior precedent. *Id.* A-8 & n.4 (citing *United States* v. *Suarez*, 263 F.3d 468 (6th Cir. 2001); *United States* v. *Zwick*, 199 F.3d 672 (3rd Cir. 1999); *United States* v. *Santopietro*, 166 F.3d 88 (2nd Cir. 1999)).

The panel majority next determined that "Congress had the power to enact § 666," despite the absence of any required nexus between the alleged bribe and a federal program. Pet. App. A-14. The majority rejected the government's argument that the statute was a lawful exercise

of the spending power. Section 666 does not contain "contractual 'terms' with which the recipient of federal funds must comply" (*id.* A-17) and furthermore "directly regulates the conduct of third parties and not the recipients of the federal benefits" (*id.* A-17). See also *id.* A-18 n.5 (noting stark three-way division among a panel of the Fifth Circuit on validity of Section 666 under the spending power).

The Eighth Circuit nonetheless sustained Section 666 on a theory the government had disavowed – that it "is a law necessary and proper to the execution of Congress's spending power." Pet. App. A-21. After deciding that "Congress has the authority to enact general criminal legislation incident to its specifically enumerated powers" (*id.* A-22-23), the majority concluded that the statute is "rationally related" to "achieving the efficacious expenditure of federal funds" (*id.* A-24) "by policing the integrity of the entire organization that receives federal benefits" (*id.* A-26). It furthermore regarded as "untenable" a scheme under which "the protection of federal funds would be left to the whim of state and local officials." *Id.* A-28.

b. Writing in dissent, Judge Bye agreed with the majority both that Section 666 does not require proof of a nexus between an alleged bribe and any federal program and that the statute is not a valid exercise of the spending power, but he dissented from the court's conclusion that the statute is a valid exercise of Congress's authority under the Necessary and Proper Clause. Pet. App. A-29-A-36. Judge Bye accepted that Section 666 was a "rational" means of protecting federal expenditures (*id.* A-31), but – noting that "the government [itself] expressed considerable discomfort" with reliance on the Necessary and Proper Clause – explained that was insufficient to render the statute "proper" under this Court's decisions in *Printz* v. *United States*, 521 U.S. 898 (1997), and *Alden* v. *Maine*, 527 U.S. 706 (1999). "These cases teach us that a law is 'proper' for the enforcement of an enumerated power only if it hews to constitutional principles of limited federal government and

state sovereignty. Federal laws that usurp the traditional domain of state authority are therefore not 'proper.'" *Id.* A-36.

Section 666, in Judge Bye's view, transgresses that fundamental limitation on congressional power and thus "lies outside the guideposts erected in *Printz* and *Alden* for assessing a 'proper' law." Pet. App. A-33. "[I]t is beyond dispute that every state--and nearly every county, tribe and city--receives [$10,000] in yearly federal benefits. Moreover, the statute requires no connection between those federal benefits and the bribe. The lack of any connection makes all too real the risk that federal anticorruption efforts will swamp state and local efforts to combat bribery." *Id.* A-33-34. The majority's contrary holding, he explained, amounts to a "federalization of anticorruption law" that "swims against the tide of governing law," including the "wave of recent Supreme Court decisions [that] emphasizes Congress's limited authority to federalize criminal conduct and to interfere with matters traditionally left to state governance." *Id.* A-29-3-, A-33 (citing *United States* v. *Morrison*, 529 U.S. 598 (2000); *Alden*, *supra*; *Printz*, *supra*; *United States* v. *Lopez*, 514 U.S. 549 (1995)). Judge Bye likened the majority's "sweeping view" of the Necessary and Proper Clause to "Congress' unbounded deployment of its Commerce Clause authority before *Lopez* and *Morrison*." *Id.* A-34-35.

5. Recognizing the substantial prospect that this Court would grant certiorari to resolve the circuit conflict directly implicated by the case, the court of appeals stayed its mandate pending the filing and disposition of this petition. This petition followed.

REASONS FOR GRANTING THE WRIT

Subsequent to *Salinas*, the circuits have "split on whether to require a federal nexus" (*United States* v. *Cabrera*, 328 F.3d 506, 509 (9th Cir. 2003)), repeatedly acknowledging that "the law is unsettled as to what § 666

requires," for "*Salinas* has not prevented courts from reaching conflicting conclusions on whether § 666 requires proof of a federal interest in the offense conduct" (*United States* v. *Zwick*, 199 F.3d 672, 681 (3rd Cir. 1999)). See also *Zwick*, 199 F.3d at 682 (noting "the struggle of other courts to construe [the] meaning" of Section 666); *United States* v. *Kranovich*, 244 F. Supp.2d 1109, 1114 (D. Nev. 2003) ("As a result of the Supreme Court's holding in *Salinas*, a circuit split has developed on the issue of whether some sort of nexus or connection must be shown."). The conflict can only be resolved by this Court, as multiple courts of appeals are on each side of the issue, and courts on each side have furthermore denied rehearing en banc to reconsider their positions.[1]

1. The decision below is in accord with the holding of the Fifth, Sixth, and Seventh Circuits, although a panel of the Sixth Circuit has expressed doubts about that court's precedent. *United States* v. *Reyes*, 239 F.3d 722, 733-34 (5th Cir. 2001) (applying *United States* v. *Westmoreland*, 841 F.2d 572, 578 (5th Cir. 1988) ("It is sufficient that Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them.")); *United States* v. *Dakota*, 197 F.3d 821, 826 (6th Cir. 1999) (applying circuit precedent holding "that the statute requires no relationship between the illegal activity and the federal funding"), *reh'g en banc deniedFeb. 4, 2000*; *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir. 1998) ("It is not our part to trim § 666 by giving its text a crabbed reading."), *reh'g en banc denied May 29, 1998*. *Compare United States* v. *Suarez*, 263 F.3d 468, 489 (6th Cir. 2001) ("Were we writing on a clean slate, I, like the dissent, might

[1] The Ninth Circuit has left the question open, although it has held that "the defrauded program or agency must receive federal funding directly, and that entities receiving only indirect benefits of federal funding * * * are not within the [statute's] purview." *United States* v. *Cabrera*, 328 F.3d 506, 509 (9th Cir. 2003).

well agree that proper application of 18 U.S.C. § 666 requires a minimal nexus between the alleged criminal activity and the federal funding received pursuant to that statute.").

Even within those courts of appeals that have sustained Section 666 as constitutional, there is a conflict over the ground on which it was validly enacted. The other Circuits that have addressed this issue deem the statute a valid exercise of the spending power. See e.g., *United States States* v. *Zwick*, 199 F.3d 672 (1999); *United States* v. *Santopietro*, 166 F.3d 88 (2nd Cir. 1999); *United States* v. *McCormack*, 31 F.Supp.2d 176, 186 n. 18 (D.Mass. 1998) (collecting cases); see also *Fisher* v. *United States*, 529 U.S. 667, 689 (2000) (Thomas J., dissenting); *United States* v. *Suarez*, 263 F.3d 468, 487 n. 7 (6th Cir. 2001 (Boggs, J., dissenting in part). The Eighth Circuit expressly rejected that view in this case, holding that Congress's authority under the Spending Clause does not extend to a statute that does not contain "contractual 'terms' with which the recipient of federal funds must comply" (Pet. App. A-17) and furthermore "directly regulates the conduct of third parties and not the recipients of the federal benefits" (*id.* A-17).

2. The decision below squarely conflicts with decisions of Second, Third, and Eleventh Circuits. The Third Circuit in *United States* v. *Zwick*, 199 F.3d 672 (1999), held that a prosecution under Section 666 requires proof of a nexus to a federal program. The court found that conclusion supported by the statutory text in two respects. "[T]he title of § 666, 'Theft or bribery concerning programs receiving Federal funds,' implies that a federal connection is anticipated." *Id.* at 682. The same conclusion follows from "the statute's reference only to 'agents' of entities receiving federal funds who accept bribes 'in connection with' the business of the organization receiving federal funds." *Id.*

According to the Third Circuit, this reading of the statute is consistent with the legislative history of Section 666. The goal of Section 666 "was to overcome impediments to reaching actions in which there was a federal

interest, not to federalize crimes in which a federal interest was lacking." *Zwick*, 199 F.3d at 684. Thus, the court concluded that "nothing in the legislative history suggests that Congress intended to * * * make § 666 applicable when no federal interest is implicated by certain offense conduct." *Id.* at 686.

The Third Circuit also found its holding supported by three canons of construction. First and foremost, this Court's precedents instruct "that we should not interpret a statute in a manner that significantly alters the federal-state balance unless Congress has clearly indicated that it intended to do so," which cannot be said of Section 666. 199 F.3d at 686 (citing *United States* v. *Bass*, 404 U.S. 336, 349 (1971). "[T]he government's interpretation * * * would criminalize a host of corrupt acts committed by state agents, among others, by virtue of the fact that all states receive at least $10,000 in federal funds per year." *Id.* The Third Circuit declined to "transform § 666 into a general federal anti-corruption statute when Congress has not clearly expressed its intention to do so." *Id.* Second, "ambiguity in the language of a criminal statute should be resolved in favor of the defendant." *Id.* (citing *Bass*, *supra*). Third, "when a statute is unclear, we will construe it so as to avoid constitutional concerns, assuming that such construction does not amount to a rewriting of the statute," a principle implicated by the fact that the government's reading "produces serious concerns as to whether Congress exceeded its power under the Spending Clause in enacting this statute." *Id.* at 687; see *United States* v. *Kranovich*, 244 F. Supp. 2d 1109, 1116 ("Requiring that the application of Section 666 be limited to conduct bearing on the expenditure of federal funds or the protection of the integrity of a federal program keeps Section 666 on firm constitutional ground.").

The Third Circuit in *Zwick* also relied on the similar holding of *United States* v. *Santopietro*, 166 F.3d 88 (2nd Cir. 1999) (per Newman, J.). The Second Circuit in *Santopietro* concluded that "nothing in *Salinas* disturbs" the

requirement, first adopted by that court in *United States* v. *Foley*, 73 F.3d 484 (1996), that a Section 666 prosecution rest on a "connection between the bribe and a risk to the integrity of the federally funded program." 166 F.3d at 93. "Indeed, *Salinas* may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied." *Id.*

Subsequently, the Eleventh Circuit strongly suggested that it would reach the same result. The Eleventh Circuit concluded that this Court's "approach to § 666 has validated the efforts of the Second and Third Circuits" to identify a constraint on the scope of the statute – *viz.*, "the recognition of an offense element limiting the statute's application to conduct bearing a sufficient connection to the expenditure of federal funds or the integrity of federal programs." *United States* v. *Ward*, 304 F.3d 1320, 1325 (2002). According to the Eleventh Circuit, this Court's decisions "confirm[] the existence of the constitutional limits suspected by the Second and Third Circuits." *Id.*

Several district courts agree with the position of the Second, Third, and Eleventh Circuits. See *United States* v. *Kranovich*, 244 F. Supp. 2d 1109 (D. Nev. 2003); *United States* v. *Wright*, 206 F. Supp.2d 609, 620 (D. De. 2002); *United States* v. *Frega*, 933 F. Supp. 1536, 1540 (S.D. Cal. 1996) (reading Section 666 not to include federal nexus requirement "would drastically change the balance of power between federal and state governments by bringing conduct that has previously been entirely in the realm of the states within the federal purview").

3. This case presents an ideal vehicle to resolve the conflict. The lower courts resolved only the question of law presented by the petition: Does 18 U.S.C. 666 criminalize acts of bribery lacking a nexus to a federal interest and, if so, is the statute in that respect a constitutional exercise of Congress's powers? That is accordingly the only question this Court would have cause to resolve. Assuming that this

Court concluded that the government is obliged to demonstrate such a nexus, it would be left to the lower courts to apply that standard to this case. But even if this Court were inclined to go further and address whether the indictment in this case asserts a sufficient nexus, there is no question that a ruling in petitioner's favor would at the least require the dismissal of the first two counts of the indictment, which do not contain even an arguable assertion of a relationship between petitioner's alleged conduct and a federal funding program.

Nor would there be any benefit to permitting the case to proceed on remand. Critically, the Eighth Circuit held that the government is not required to introduce any evidence of a relationship between an alleged bribe and a federally funded program. Further proceedings in the district court accordingly will not illuminate the question presented as it relates to this case. Indeed, the suitability as a vehicle of any case raising the question presented after trial is apt to be clouded by the government's suggestion that the case is an inappropriate vehicle because there is *some* evidence in the record of *some* relationship between the charged offense and federal programs. The issue would accordingly best be addressed in the posture of this case, which was dismissed on the ground that the indictment did not charge an offense within Congress's power to proscribe.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX INDEX

Decision of the United States Court of Appeals for the Eighth Circuit, dated April 7, 2003..... A-1

Memorandum Opinion and Order, United States District Court for the District of Minnesota, dated January 28, 2002..... A-37

Indictment in United States v. Basim Omar Sabri, dated August 21, 2001..... A-63

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1561

United States of America,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Minnesota.
Basim Omar Sabri,	*	
	*	
Appellee.	*	

Submitted: June 14, 2002
Filed: April 7, 2003

Before HANSEN,[1] Chief Judge, BOWMAN and BYE, Circuit Judges.

HANSEN, Circuit Judge.

The government appeals from an order of the district court dismissing an indictment against Basim Omar Sabri. We reverse the judgment of the district court.

I.

The grand jury charged Sabri with three counts of bribery in violation of 18 U.S.C. §666(a)(2).[2] The indictment alleged the

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[1] The Honorable David R. Hansen stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on March 31, 2003: He has been succeeded by the Honorable James B. Loken.

[2] The statute provides, in relevant part, that:

following facts. The City of Minneapolis (hereinafter "City") received approximately $28.8 million in federal funds during the calendar year beginning January 1, 2001. The Minneapolis Community Development Agency (hereinafter "MCDA") is a City agency created to fund housing and economic development programs within the City. MCDA received approximately $23 million in federal funds in the calendar year beginning January 1, 2001. The Minneapolis Neighborhood Revitalization Program (hereinafter "MNRP") is an agency created by the City and other local government entities which provides funding for the economic

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> (a) Whoever, if the circumstance described in subsection (b) of this section exists-
>
> . . . .
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. §666 (2000).

revitalization of City neighborhoods. MCDA wholly funds MNRP.

Sabri is a Minneapolis developer and landlord. During the spring and summer of 2001, Sabri was pursuing a commercial real estate project within the City's Eighth Ward. From 1993 through July 2001, Brian Herron served on the City Council, representing the Eighth Ward. He also served on the Board of Commissioners overseeing MCDA's budget. The government alleged that Sabri gave Herron $5000 in an attempt to obtain Herron's assistance in receiving regulatory approval from the City to commence the proposed real estate project; that Sabri offered Herron $10,000 to threaten the current property owners that the City would use its powers of eminent domain to take their property if they did not sell to Sabri; and that Sabri offered to give Herron $80,000 as a 10% kickback in return for his assisting Sabri to obtain $800,000 in community economic development grants for the proposed real estate project.

Sabri filed a motion to dismiss the indictment on the ground that §666(a)(2) was facially unconstitutional because it does not require the government to prove a nexus between the offense conduct the offering of a bribe-and the federal funds. Without such a "jurisdictional hook," that is, a clause that purports to ensure that the law applies only to activity that falls within the federal lawmaking power, Sabri argued that the statute was outside Congress's legislative power. The district court agreed with Sabri's arguments and granted his motion to dismiss the indictment.[3] We agree with the district

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[3] To the extent that the district court, relying on United States v. Lopez, 514 U.S. 549 (1995), concluded that §666 contained no "'express jurisdictional element' that confer[red] federal court jurisdiction over the offenses described in §666," United States v. Sabri, 183 F. Supp. 2d 1145, 1154 (D. Minn. 2002), it erred. The Lopez Court's use of the word "jurisdiction"

court that as a matter of statutory construction the government need not prove some nexus between the offense conduct and federal funds. We respectfully disagree that the statute as construed is beyond Congress's power to legislate.

II.

We first turn to the question of statutory construction: whether §666 itself requires that the government prove some connection between the offense conduct and the expenditure or use of federal funds. We hold that §666 contains no requirement that the government prove some connection between the offense conduct and federal funds beyond the express statutory requirement found in §666(b) which requires proof that the relevant organization, government, or agency received benefits under a federal program in excess of $10,000 in any one-year period.

The Supreme Court addressed this question of statutory construction in part in Salinas v. United States, 522 U.S. 52 (1997). Salinas, a deputy sheriff who had accepted bribes in exchange for arranging "contact visits" between a federal prisoner housed in the Hidalgo County jail and the prisoner's wife and girlfriend, argued that "the Government must prove

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referred to the power of the Congress to enact legislation and not to the subject matter jurisdiction of the court. Lopez, 514 U.S. at 561. The district court had subject matter jurisdiction over this case because Sabri was charged with an "offense[] against the laws of the United States:"18 U.S.C. §3231 (2000). See e.g., United States v. Ryan, 41 F.3d 361, 363 (8th Cir. 1994) (en banc) (concluding that the express jurisdictional element contained in 18 U.S.C. §844(i) was merely an element of the offense and that "the court [would] not by the failure of proof on that element [be] deprived of judicial jurisdiction"), cert. denied, 514 U.S. 1082 (1995).

the bribe in some way affected federal funds, for instance by diverting or misappropriating them" before the statute was violated. Id. at 55. A unanimous Court rejected Salinas's argument, noting that the "enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate" the statute. id. at 56-57. Specifically, the Court noted that the word "'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction," Id. at 57, and "that, as a matter of statutory construction, §666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds," id. at 61.

The only issue before the Salinas Court, however, was a narrow question of statutory construction: whether "§ 666 [is] limited to cases in which the bribe has a demonstrated effect upon federal funds." Id. at 54 (emphasis added). The Court explicitly left open the more sweeping question of whether §666 requires the government to demonstrate some other, less direct connection between the offense conduct and federal funds. Id. at 59 ("We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a .prisoner in facilities paid for in significant part by federal funds themselves."); see also United States v. Zwick, 199 F.3d 672, 679 (3d Cir. 1999) (stating that the Salinas Court resolved the question of whether the government must show that the offense conduct actually affected or involved federal funds but left open the question of whether §666 requires some other connection between the offense conduct and the expenditure of federal funds). Several of our sister circuits have addressed this more broad question.

The Seventh Circuit has given §666 a broad reading, ultimately concluding that "[i]t [was] not [its] part to trim §666, by giving its text a crabbed reading." United States v Grossi, 143 F.3d 348, 350 (7th Cir.), cert. denied, 525 U.S. 879 (1998). Likewise, the Sixth Circuit has concluded that "18 U.S.C. §666 does not require a nexus between the alleged bribes and the, federal funding." United States v. Dakota, 197 F.3d 821, 826 (6th Cir. 1999).[4] The Fifth Circuit also has eschewed any nexus requirement. In United States v. Westmoreland, 841 F.2d 572 (5th Cir.), cert. denied, 488 U.S. 820 (1988), a county supervisor was convicted of accepting bribes and kickbacks in connection with her duty to purchase supplies for the county's highway construction projects. Id. at 573-74. The county received $222,949 in federal funds, but those funds were segregated and the alleged criminal activity did not affect or implicate federal monies. Id. 575. Nonetheless, the Fifth Circuit concluded that:

> [b]y the terms of section 666, when a local government agency receives an annual benefit of more than $10,000 under a federal assistance program, its agents are governed by the statute, and an agent violates subsection (b) when he engages in the prohibited conduct in any transaction or matter or series of transactions or matters . . . concerning the affairs of the local government agency.

[4] Although the Sixth Circuit has applied Dakota as good law, it has questioned its validity. See United States v. Suarez, 263 F.3d 468, 489 (6th Cir. 2001) (stating that if the court were writing on a clean slate, it "might well agree that proper application of 18 U. S.C. §666 requires a minimal nexus between the alleged criminal activity and the federal funding received pursuant to that statute," but in light of Dakota, it was bound to conclude that §666 requires no nexus), cert. denied, 535 U.S. 991 (2002).

Id. at 576 (internal quotation omitted). The Fifth Circuit reaffirmed its position in United States v. Moeller, 987 F.2d 1134 (5th Cir. 1993), concluding that §666 required only a nexus between the offense conduct and the agency receiving federal funds and that this nexus was satisfied by §666(b). Id. at 1137. It confirmed its position more recently in United States v. Lipscomb, 299 F.3d 303 (5th Cir. 2002), in an opinion the court itself described as suffering from "tripartite fractionation." Id. at 305 (Wiener, J.). Despite their differences on other issues, see infra Part III. A., n.5, all members of the Lipscomb panel agreed that Westmoreland is still the law of the Fifth Circuit. See id. at 313 (Wiener, J.), 354 (Duhé, J., concurring in part, dissenting in part), 365 (Smith, J., dissenting).

Two circuits, the Second and the Third, conclude that §666 requires the government to prove at least some minimal nexus between the bribery and the federal benefits beyond that explicitly required in § 666(b). See Zwick,199 F.3d at 682 n.7; United States v. Santopietro, 166 F.3d 88, 93 (2d Cir. 1999).

In Santopietro, the Second Circuit recognized that Salinas limited its decision in United States v. Foley, 73 F.3d 484 (2d Cir. 1996), but concluded that it left untouched that part of Foley holding that §666 "requires at least some connection between the bribe and a risk to the integrity of the federal funded program." Santopietro, 166 F.3d at 93. The Foley Court reached the conclusion that §666 required the government to prove a connection between the bribe and the federal funds only after finding the statute to be ambiguous and then turning to the legislative history to resolve that ambiguity. Foley, 73 F.3d at 489.

Despite the long-standing principle of statutory construction that the title of a statute cannot control the plain language of the statute, the Third Circuit reasoned that the title of §666, "Theft or bribery concerning programs receiving Federal funds," implied that the statute contains a minimal nexus requirement. Zwick, 199 F.3d at 682. It avoided the "literal interpretation" of the statute and instead relied upon legislative history to construct a "plausible, albeit more contextual[] alternative" reading. Id. at 683. It reasoned that "Salinas found §666(a)(1)(B) clear and unambiguous only on the question of whether the government must prove that the corrupt activity had a demonstrated effect on federal funds or programming," id. at 682 n.7, but that "nothing in Salinas prevent[ed it] from determining that §666(a)(1)(B) is ambiguous on the issue of whether there is a federal connection requirement," id. We respectfully disagree with the proposition that §666 is ambiguous on the federal connection requirement.

As with any question of statutory construction, we look first to the text of the statute itself. United States v. McIntosh, 236 F.3d 968, 971 (8th Cir.), cert. denied, 532 U.S. 1022 (2001). Section 666(a)(2) makes it a crime to "corruptly give[], offer[], or agree [] to give anything of value to any person, with intent to influence or reward an agent of a[] ... local ... government, ... or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more" if the "organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance or other form of Federal assistance." 18 U.S.C. §666 (emphasis added). The plain language encompasses the activity of local agents wherever subsection (b) attains. There is no qualification that the prohibited conduct must have some relation to federal

funds. Indeed, the statute proscribes the conduct of local agents in connection with "any" agency business or transaction. The word "any" is unambiguous and unqualified. Salinas, 522 U.S. at 57; Mo. Mun. League v. F.C.C., 299 F.3d 949, 955 (8th Cir. 2002) (citing cases and stating that time and time again the Court has held that the modifier "any" prohibits a narrow construction of a statute), petition for cert. filed (Feb. 18, 2003) (No. 02-1238); Westmoreland, 841 F.2d at 576 (" [T]he relevant statutory language [is] plain and unambiguous. ");United States v. McCormack, 31 F. Supp. 2d 176, 186 (D. Mass. 1998) (stating Salinas "announced that the statutory language, 'in connection with any business or transaction' is not ambiguous," that "[t]he language is clear," and that "the reach of the statute is clearly broad"). It is clear to us that the plain text of the statute does not require any connection between the federal funds received by the agency and the offense conduct. The statute applies to all offense conduct involving anything of value of $5000 or more that involves "any" agency business, transaction, or series of transactions so long as the relevant agency received the requisite amount of federal benefits ($10,000) within the defined time period as required in §666(b).

The argument that §666 is unambiguous as to the narrow question answered in Salinas but ambiguous as to the broad question presented here is unpersuasive. "A statute can be unambiguous without addressing every interpretive theory offered .... It need only be plain to anyone reading the Act that the statute encompasses the conduct at issue." Salinas, 522 U.S. at 60 (internal quotation omitted). Thus, while it is true that the Salinas Court held only that the government need not prove that the offense conduct directly affected federal funds, the Salinas Court's characterization of the operative terms of the statute as broad and unqualified supports our conclusion that the statute is also unambiguous as to the broader question presented here. See Salinas, 522 U.S. at 56

(stating that "[t]he enactment's expansive, unqualified language" does not support a limiting interpretation of the statute), 57 ("The prohibition is not confined to a business or transaction which affects federal funds."), 57 ("Furthermore, the broad definition of the 'circumstances' to which the statute applies provides no textual basis for limiting the reach of the bribery prohibition."), 57 ("The statute applies to all cases in which an 'organization, government, or agency' receives the statutory amount of benefits under a federal program."), 57 ("The statute's plain language fails to provide any basis for limiting §666(a)(1)(B) to bribes affecting federal funds."). The Court reaffirmed this broad reading of §666 in Fischer v. United States, 529 U.S. 667 (2000). There, the court described §666 as "expansive, both as to the conduct forbidden and the entities covered." Id. at 678 (internal quotations and alteration omitted).

The fact that the Salinas Court construed §666(a)(1)(B) and that this case involves §666(a)(2) makes no difference in our analysis. Section (a)(1) and section (a)(2) are complementary provisions: one section criminalizes the solicitation or acceptance of bribes while the other criminalizes the offering or giving of bribes. Both provisions, however, prohibit bribery in connection with "any business, transaction, or series of transactions" of organizations which receive the requisite amount of federal benefits required in subsection (b). Neither provision suggests that the business or transaction in question must somehow implicate a federal program. For the point under consideration here, the relevant terms of the two sections are identical. Therefore, relying on the text of the statute and the Supreme Court's characterization of the operative language in the statute as broad and unqualified, we conclude that §666 is unambiguous as to the question presented here.

Generally, where the text of a statute is unambiguous, the statute should be enforced as written, McIntosh, 236 F.3d at 972, and "[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language," United States v. Albertini, 472 U.S. 675, 680 (1985) (internal quotation omitted). We find no extraordinary showing of contrary intent that warrants deviation from the plain text of the statute. Congress enacted §666 to "safeguard finite federal resources from corruption and to police those with control of federal funds." U.S. v. Rooney, 37 F.3d 847, 851 (2d Cir.1994); see also S. Rep. No. 98-225, at 370 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3511 ("[T]he purpose of this section [is] to protect the integrity of the vast sums of money distributed through federal programs."). Prior to the enactment of §666, however, the task of protecting the integrity of federal funds was made more difficult because of gaps in the statutory scheme. Specifically, prior to the enactment of §666:

> thefts from other organizations or governments receiving federal financial assistance [could have been] prosecuted under the general theft of federal property statute, 18 U.S.C. 641, only if it [could have been] shown that the property stolen [was] property of the United States. In many cases, such prosecution [was] impossible because title ha[d] passed to the recipient before the property [was] stolen, or the finds [were] so commingled that the federal character of the funds [could not] be shown. This situation [gave] rise to a serious gap in the law, since even though title to the monies may have passed, the federal government clearly retain[ed] a strong interest in assuring the integrity of such program funds.

S. Rep. No. 98-225, at 369, reprinted in 1984 U.S.C.C.A.N. at 3510; see also United States v. Ferrara, 990 F. Supp.146, 149-50 (E.D.N.Y. 1998) ("Moreover, [prior to the enactment of

§666,] successful prosecutions were impossible in those instances where title to the federal property had passed to a recipient before the property was stolen, or where the federal character of the funds was irredeemably lost due to commingling with non-federal monies."). Section 666 was passed to fill the gaps in the prior anticorruption scheme. Westmoreland, 841 F.2d at 577 (stating that Congress specifically chose to protect the integrity of federal funds "by enacting a criminal statute that would eliminate the need to trace the flow of federal monies and that would avoid inconsistencies caused by the different ways that various federal programs disburse funds and control their administration"). Congress decided that the most effective way to insure the integrity of federal funds disbursed to sub-national agencies was to change the enforcement paradigm from one that monitored federal funds to one that monitored the integrity of the recipient agencies. Fischer, 529 U.S. at 678 ("Coupled with the broad substantive prohibitions of subsection (a), the language of subsection (b) reveals Congress's expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs."); United States v. Simas, 937 F.2d 459, 463 (9th Cir. 1991) ("By enacting section 666; Congress plainly decided to protect federal funds by preserving the integrity of the entities that receive the federal funds rather than requiring the tracing of federal fiends to a particular illegal transaction."); Westmoreland, 841 F.2d at 578 ("Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them.").

The legislative history reveals that §666 was drafted and enacted to "extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds," Salinas, 522 U.S. at 58 (emphasis added), and not to limit the scope of the federal bribery prohibition. In addition, because §666 changed the focus of

federal anticorruption efforts from policing federal funds to policing the agencies that receive and administer those funds, the argument that there must be a nexus between the offense conduct and the federal funds beyond that explicitly provided for in §666(b) seems inconsistent with the statute. In any event, in light of the foregoing legislative history we conclude, at minimum, that there is no clear or extraordinary showing of contrary legislative intent sufficient to cause us to override the text of a statute unambiguous on its face.

While we recognize that in construing statutes courts should avoid constitutional questions where possible, we note that even if we were to conclude that §666 contained an unstated nexus requirement between the offense conduct and the federal funds, that would not dispose of the lurking constitutional question. Simply concluding that the statute contains an undefined nexus requirement ignores the constitutional question of whether Congress had the power to enact this statute at all. No amount of creative interpolation could save a statute that Congress lacked the authority to enact. United States v. Morgan, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., concurring) ("Judicial efforts to render §666 palatable by adding an element to the crime cannot alter our Constitution's basic limitation on federal legislative power. No amount of creative drafting permits the judiciary to preserve a statute that Congress plainly lacked the power to create."), cert. denied, 534 U.S. 825 (2001). Because we conclude, however, that §666 as construed is a law necessary and proper to the execution of the Spending Power; see infra Part III.B., we need not worry about limiting the scope of a plainly written statute.

Given the plain and unambiguous language of the statute and the absence of any extraordinary contrary legislative history which suggests that we should deviate from the text, we are compelled to conclude that other than the threshold

showing that the agency in question received more than $10,000 in federal benefits in any one-year period, §666 imposes no requirement that there be a connection between the offense conduct and the federal funds. See Morgan, 230 F.3d at 1073 (Bye, J., concurring) (concluding that a federal nexus requirement should not be read into §666 on the grounds that the court should not inject elements into plain and unambiguous statutes); George D. Brown, Stealth Statute--Corruption, The Spending Power, and the Rise of 18 U.S.C. §666, 73 Notre Dame L. Rev. 247, 280-81 (1998) ("[I]t is impossible to deny that the actual statute is the antithesis of narrow. Fairly read, it gives the federal government authority to deal with a range of malfeasance anywhere within governmental ... entities that benefit from a variety of programs, whether or not the wrongdoing is connected to the federal assistance.").

III.

Having determined that the statute does not require a nexus between the criminal activity and the federal funds, we now turn to the question of whether Congress had the power to enact §666. We review this federal constitutional question de novo. United States v. Shepherd, 284 F.3d 965, 969 (8th Cir. 2002).

A. Section 666 is not a condition placed on the receipt of federal funds.

It is axiomatic that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." United States v. Morrison, 529 U.S. 598, 607 (2000). The courts that have applied §666 agree that Congress enacted §666 pursuant to its spending powers. See e.g., Fischer, 529 U.S. at 689-90 n.3 (Thomas, J., dissenting); McCormack, 31 F. Supp. 2d at 186 n.18 (collecting cases).

The spending power is encompassed in Art. I., §8, cl. l, of the Constitution. Pennhurst State Sch. v. Halderman, 451 U.S. l, 9 n.5 (1981). It provides that the "Congress shall have Power To ... provide for the ... general Welfare of the United States." U.S. Const. art. I, cl. l. The Supreme Court has "repeatedly characterized ... Spending Clause legislation as much in the nature of a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions." Barnes v. Gorman 122 S. Ct. 2097, 2100-01 (2002) (internal quotation and alteration omitted). The government argues that §666 can be sustained as a valid condition placed on the receipt of federal funds. We disagree.

While traditional Spending Clause legislation is in the "nature" of a contract, it is not a contract. Mo. Child Care Assn v. Cross, 294 F.3d 1034, 1041 (8th Cir. 2002). Instead, "contract" is used only metaphorically to illuminate and explain certain aspects of the relationship formed between the federal government and the recipient of the federal funds. We find this metaphor useful to our discussion here, and we note that §666 has none of the hallmarks of a contractual relationship which characterizes typical Spending Clause legislation.

Unlike typical Spending Clause enactments, §666 imposes no affirmative obligation on the recipient of federal funds. Cf. South Dakota v. Dole, 483 U.S. 203, 205 (1987) (sustaining 23 U.S.C. §158 (1982 ed. Supp. III), which directed the Secretary of Transportation to withhold a certain percentage of federal highway funds from states which had not yet made it illegal for a person under age 21 to purchase or possess alcohol, as a valid condition on the receipt of federal funds); Pennhurst, 451 U.S. at 12-13 (noting that under the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, the recipient of federal funds had to take "'affirmative action' to hire qualified

handicapped individuals," submit a plan evaluating services offered under the Act, and provide the federal government with assurances that each person serviced in the program had a habilitation plan); Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) ("Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal . . . directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy."), 474 ("The program conditions receipt of public works grants upon agreement by the state or local governmental grantee that at least 10% of the federal funds will be devoted to contracts with minority businesses."), overruled on other grounds by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

Nor does §666 proscribe conduct of the recipient of the federal funds. Cf. Barnes, 122 S. Ct. at 2101 n. 1 (concluding that valid Spending Clause legislation can include legislation that "simply prohibits certain discriminatory conduct." (internal quotation and alteration omitted)); Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2272-73 (2002) (describing the Family Educational Rights and Privacy Act of 1974, 88 Stat. 571, as a conditions statute which authorizes the withholding of federal funds from educational institutions that permit the release of education records without the consent of the students); Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 638 (1999) (discussing Title IX of the Education Amendments of 1972, 86 Stat. 373, which prohibits sex-based discrimination under any education program receiving federal financial assistance); Lau v. Nichols, 414 U.S. 563, 566 (1974) (upholding application of the Civil Rights Act of 1964, 78 Stat. 241, which prohibits discrimination in any program or activity receiving federal financial assistance).

As such, §666 has no contractual "terms" with which the recipient of federal funds must comply. Barnes, 122 S. Ct. at 2101 ("Just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress's power to legislate under the spending power rests on whether the recipient voluntarily and knowingly accepts the terms of the 'contract.'" (internal quotation and alteration omitted)). We conclude therefore that §666 is not a conditions statute at all and that the traditional Dole analysis is inapplicable here. United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995) ("18 U.S.C. §666 does not impose a condition on the receipt of federal funds. The statute neither requires a state's compliance with federal regulatory or administrative directives, nor prevents state action. . . . Section 666 does not derogate any state right.... Section 666 does not force the state government to do anything." (internal citations and quotations omitted)), aff'd 141 F.3d 1152 (2d Cir.), cert. denied, 525 U.S. 814 (1998).

The fact that §666 directly regulates the conduct of third parties and not the recipients of the federal benefits supports our conclusion that this is not a conditions statute at all. Morgan, 230 F.3d at 1074 (Bye, J., concurring) ("In enacting §666, ...Congress did not contract with states or local governments .... Section 666 reaches beyond punishment of the state and local governments who receive those funds to proscribe the conduct of third persons who aren't parties to the funding contract."); Cantor, 897 F. Supp. at 113 ("All Congress has done in Section 666 is to pass a law making the conduct of individuals, not the state, criminal." (internal quotations omitted)). We could find no persuasive or authoritative case law supporting the proposition that Congress, acting pursuant to its power to attach conditions to the receipt of federal funds, has the authority to directly regulate the conduct of third parties who are not actually the

recipients of the federal funds.[5] Instead, the case law demonstrates that funding condition statutes may only directly regulate the recipients of the federal funds who then may or may not undertake action vis-a-vis third parties. See e.g., Davis, 526 U.S. at 640 ("[I]n return for federal funds, the States agree to comply with federally imposed conditions." (internal quotation omitted) (emphasis added)), 641 (affirming statute because it was drafted in such a way that "[t]he Government's enforcement power may only be exercised against the funding recipient." (emphasis added)); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) ("The two statutes [Title VI and Title IX] operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." (emphasis added)); Dole, 483 U.S. at 206 ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal ...directives." (emphasis added) (internal quotations omitted)); Oklahoma v. United States Civil Svc. Comm'n,

[5] The Fifth Circuit recently addressed the question of whether §666 can be sustained as a condition on the receipt of federal funds. The panel could not generate a majority for any position. Judge Wiener opined that §666 was similar to a crosscutting condition-one that applies to all grants of federal money-and applied the Dole conditions analysis. Lipscomb, 299 F.3d at 318-23 (Wiener, J., writing separately as to Part V. B.). Judge Duhé did not reach the issue, because, he argued, it was not raised at trial or on appeal. Id. at 360 (Duhé, J., concurring in part and dissenting in part). Judge Jerry E. Smith concluded that §666 "does not qualify as a conditional grant statute." Id. at 366 (Smith, J., dissenting).

330 U.S. 127, 144 (1947) ("The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans ...is not unusual." (emphasis added)). Accordingly, we conclude that §666 cannot be sustained as a condition attached to the receipt of federal funds because this statute is not a conditions statute at all. Section 666 is merely a general criminal statute which directly regulates the conduct of persons who are not parties to the funding "contract."

B. Section 666 is a necessary and proper exercise of Congressional power.

Our conclusion that this statute is not a conditions-type statute does not necessarily render it infirm. Indeed, the Supreme Court has intimated that §666 is a constitutional exercise of Congress's legislative power. See Salinas, 522 U.S. at 60 ("[T]here is no serious doubt about the constitutionality of §666(a)(1)(B) as applied to the facts of this case."), 61 ("We simply decide that ... §666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds and that under this construction the statute is constitutional as applied in this case."). Our brother Bye has previously concluded that the above quoted sentences are mere "constitutional speculations." Morgan, 230 F.3d at 1072 n.3. We find it significant that no member of the unanimous Salinas Court disagreed with or qualified these statements. In addition, in Fischer, the Court resolved another issue of statutory construction arising under §666, and no member of the Court suggested that the statute might be constitutionally infirm. We think it ill-advised to now declare that §666 is void ab initio as being outside of Congress's legislative domain after the Supreme Court has twice indicated that the statute can be constitutional as applied. With that thought in mind, we look beyond the Spending Clause to other provisions of the

Constitution which may or may not provide legal authority to sustain §666.

So that the Constitution "be not a splendid bauble," the framers of our government inserted the Necessary and Proper Clause into the Constitution to "remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution." M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420-21(1819). The Clause provides that "[t]he Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution" all the powers vested in the Government of the United States. U.S. Const. art. I, §8, c1.18. Both the Spending Power and the Necessary and Proper Clause are contained in section 8 of the first Article, and the Necessary and Proper Clause applies to the spending power, enabling Congress to enact all laws which are convenient to the exercise of disbursing federal funds. Fullilove, 448 U.S. at 474 ("[T]he power to 'provide for the ... general Welfare' is an independent grant of legislative authority, distinct from other broad congressional powers."); Buckley v. Valeo, 424 U.S. 1, 90 (1976) ("[T]he General Welfare Clause . . . is ... a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause."); M'Culloch, 17 U.S. at 421. We recognize that the Necessary and Proper Clause does not confer upon the Congress a broad police power. It does, however, allow Congress the luxury to choose from an array of means with which to implement its enumerated powers, including its Spending Power. Chief Justice Marshall has best articulated the relationship between constitutional means and ends: "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." M'Culloch, 17 U.S. at 421.

Applying the M'Culloch framework, we conclude that §666 is a law necessary and proper to the execution of Congress's spending power. See United States v. Edgar, 304 F.3d 1320, 1325 (11th Cir.) ("[W]e are persuaded that a basis for the enactment of §666 may be found in Congress's authority, under the Necessary and Proper Clause, to protect its capacity to fruitfully exercise the spending power.") cert. denied, 123 S. Ct. 679 (2002); United States v. Bigler, 907 F. Supp. 401, 402 (S.D. Fla. 1995) ("Article I, §8 gives Congress the power to 'provide for the ... general Welfare.' This power, in conjunction with the necessary and proper clause, gives Congress the power to enact §666. In doing so, Congress did not violate the principle of federalism, nor did it violate the tenth amendment."). First, we think it an incontestable proposition that the disbursement of federal funds to subnational agencies to advance the general welfare is a legitimate end within the scope of the Constitution. We further quickly conclude that Congress also has a legitimate right to protect these disbursements from misappropriation once made. We also conclude that §666 is consistent with and does not contravene the letter or spirit of the Constitution.[6]

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[6] The dissent argues that this law is not ''proper," that is, it contravenes the letter and spirit of the Constitution by failing to recognize constitutional principles of limited federal government and state sovereignty. In support of this argument, the dissent relies on Alden v. Maine, 527 U.S. 706 (1999), Printz v. United States, 521 U.S. 898 (1997), and New York v. United States, 505 U.S. 144 (1992), for the proposition that "[f]ederal laws that usurp the traditional domain of state authority are . . . not proper." Post at 4. We, respectfully, are of the view that the dissent reads these cases too broadly. Alden, Printz, and New York answer only the limited question of when the central government is prohibited from acting directly on the States or on the States' officers.

The difficult question in this case is whether §666 is an appropriate means plainly adapted to achieving Congress's end. The resolution of this inquiry raises two subsidiary questions: (1) whether Congress has the power to enact criminal legislation pursuant to the Necessary and Proper Clause, and if so, (2) whether §666 is plainly adapted, i.e., rationally related, to achieving Congress's end.

As to the first question, we have no doubt that the creation of a general criminal law incident to a constitutional end is

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See Alden, 527 U.S. at 712 ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); Printz, 521 U.S. at 935 (holding that Congress cannot compel State officers to administer federal regulatory program); New York, 505 U.S. at 149 (holding that Constitution does not confer upon Congress the power to compel the States to enact a regulatory program). These cases merely recognize the larger constitutional principle that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," and that "where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts it lacks the power directly to compel the States to require or prohibit those acts." New York, 505 U.S. at 166; accord Alden, 527 U.S. at 714; Printz, 521 U.S. at 919-20. None of these cases addresses the question presented here: whether Congress has the authority to regulate the conduct of individuals, not States, who deal with organizations that receive federal benefits. Because there has been no clear signal from the Supreme Court that there are independent federalism-based limits on the power of Congress to regulate the conduct of individuals, we conclude that this statute is "proper" and does not contravene the letter or spirit of the Constitution.

within the sovereign power of the federal government. M'Culloch, 17 U.S. at 418 ("The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers."). Chief Justice Marshall provided concrete examples of the scope of this power in M'Culloch:

> Take, for example, the power 'to establish post-offices and post-roads.' This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail.... This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice.

Id. at 417. More recently, our court has recognized that Congress has the authority to pass a criminal law of general application pursuant to the Necessary and Proper Clause. See United States v. Dittrich, 100 F.3d 84, 87 (8th Cir. 1996) ("A law making it a crime to steal property from a Post Office is well within even the narrowest construction of the Necessary and Proper Clause."), cert. denied, 520 U.S. 1178 (1997); see also Dropps v. United States, 34 F.2d 15, 18 (8th Cir. 1929) ("That Congress has power under the constitution to enact a law punishing bribe taking on the part of officers of the United States and others acting in an official capacity for the United States is patently within its general powers to make all

laws necessary and proper for carrying into execution the particular powers specifically conferred upon it."), cert. denied, 281 U.S. 720 (1930). These authorities demonstrate that Congress has the authority to enact general criminal legislation incident to its specifically enumerated powers.

As to the more specific question, we conclude that §666 is a means plainly adapted, i.e., rationally related, to achieving the efficacious expenditure of federal funds and is, therefore, a law necessary and proper to the execution of the spending power. In M'Culloch, Chief Justice Marshall determined that "necessary" had an expansive meaning. The Clause does not restrain Congress's choice of means to only those means that are absolutely or indispensably necessary to the exercise of its powers. Rather, the Necessary and Proper Clause allows Congress to exercise its discretion in choosing particular means that may not be "necessary" in the strict sense of the word, but instead are convenient or conducive to the exercise of its powers. The Legal Tender Cases, 110 U.S. 421, 441 (1884) ("Where various systems might be adopted . . ., it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."); M'Culloch, 17 U.S. at 420. Thus, Chief Justice Marshall, relying on his expansive interpretation of "necessary," concluded that the power to establish post offices and post roads included the power to establish criminal penalties for interfering with the mail. Likewise, he concluded that the federal government could incorporate a National Bank even though that power is not enumerated in Article I. Chief Justice Marshall concluded that these so called "implied powers" were constitutional exercises of the sovereign power because each reasonably advanced an enumerated power. M'Culloch thus teaches us that Congress may use means which are unspecified in the

text of the constitution to achieve enumerated ends where there is a rational relationship between the means and the ends. Here, we know the end is the efficacious disbursement of federal funds. To determine whether §666 is rationally related to that end we must look to Congress's intent in passing the law and the specific mechanisms by which §666 hopes to achieve the desired end.

As we have discussed above, §666 was designed to protect the integrity of the vast sums of federal monies disbursed through federal programs. Section 666 could have been more narrowly crafted to more directly advance this goal, for example, by criminalizing the theft of the federal funds themselves while in the hands of the recipient or by requiring a direct nexus between the offense conduct and a federal program, but "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality to perform its function." Yakus v. United States, 321 U. S. 414, 425 (1944) (internal quotation and alteration omitted). Here, Congress has made a determination that the most effective way to protect the integrity of federal funds is to police the integrity of the agencies administering those funds. As discussed in Part II, a more limited statutory scheme was rendered toothless because of the difficulty of tracing federal funds once they had been disbursed. In addition, we note that "money is fungible and its effect transcends program boundaries." Grossi, 143 F.3d at 350. The maladministration of funds in one part of an agency can affect the allocation of funds, whether federal or local in origin, throughout an entire agency. Thus, to suggest that corruption involving a discrete department or section of an agency that does not itself receive federal funds or administer a federal program can have no effect on the integrity or efficacy of a federal program is to ignore the fact that money is fungible and that federal funds are often comingled with funds from other sources. Section 666 addresses this problem

by policing the integrity of the entire organization that receives federal benefits. In sustaining the constitutionality of §666 under the Necessary and Proper Clause, the Eleventh Circuit recently has come to the same conclusion. See Edgar, 304 F.3d at 1327 ("It is reasonable for Congress to conclude that any corruption of such recipient organizations, regardless of whether the corruption involves the misappropriation of specifically federal funds, endangers the comprehensive programs in which the organizations participate, and thus the effective exercise of the Congressional spending power as well.").

The Court has approved this type of indirect enforcement mechanism in another context. In Westfall v. United States, 274 U.S. 256 (1927), the Supreme Court affirmed the constitutionality of the Federal Reserve Act, 38 Stat. 259, as amended, 40 Stat. 232, which made it a crime to misapply the funds of a State bank that was a member of the Federal Reserve System. The reasoning of the Court is persuasive on the issue presented in this case:

> The argument is that Congress has no power to punish offences against the property rights of State banks. It is said that the statute is so broad that it covers such offenses when they could not result in any loss to the Federal Reserve Banks. . . . [I]f a State bank chooses to come into the System created by the United States, the United States may punish acts injurious to the System, although done to a corporation that the State also is entitled to protect. . . . That there is such a System and that the Reserve Banks are interested in the solvency and financial condition of the members also is too obvious to require a repetition of the careful analysis presented by the Solicitor General. The only suggestion that may deserve a word is that the statute applies indifferently whether there is a loss to the

> Reserve Banks or not. But every fraud like the one before us weakens the member bank and therefore weakens the System. Moreover, when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.

Id. at 258-59 (internal citations omitted). As in Westfall, the government here has an interest in ensuring that the system of subnational agencies that administer federal funds remains strong even where there is not a direct loss to the federal funds themselves. Congress could well have determined that an agency official who is willing to take a bribe in the disbursements of nonfederal program money is not a person who should be entrusted with federal program funds either.

Any concern that we may have had regarding the scope of this law is allayed by the statute itself. The statute is self-limiting to ensure that "federal regulatory power [does not] tag along after federal money like a hungry dog." Morgan, 230 F.3d at 1074 (Bye, J., concurring) (internal quotations and emphasis omitted). Section 666(b) is a jurisdictional provision that ensures in each particular case that the federal power will be exercised only where the federal government has a substantial interest at stake and where substantial federal funds may be at risk. See Fischer, 529 U.S. at 689 n.3 (Thomas, J., dissenting) ("Title 18 U.S.C. §666(b) is, after all, a jurisdictional provision that allows federal prosecution only if the specific organization at issue received more than $10,000 in 'benefits.'"), id. at 690 n.3 ("Without a jurisdiction provision that would ensure that in each case the exercise of federal power is related to the federal interest in a federal program, §666 would criminalize routine acts of fraud or bribery."). The $10,000 threshold requirement and the $5000 transactional requirement create a sufficient nexus between the offense conduct and federal funds to ensure that federal

power will not be extended to the prosecution of merely local matters that may not jeopardize in any significant manner the integrity of federal programs.

More importantly, were we to conclude that Congress lacked the authority to legislate in this area, then the protection of federal funds would be left to the whim of state and local officials-perhaps even the same officials who pose a threat to the integrity of the federal funds in the first place and who therefore possess a strong disincentive to protect them. The proposition that the federal government is powerless to vindicate its own interests is clearly untenable:

> "The government of the Union, though limited in its powers, is supreme within its sphere of action. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."

Logan v. United States, 144 U.S. 263, 283 (1892), quoting M'Culloch, 17 U.S. at 424. We reject it.

Accordingly, we hold that §666 is a legitimate exercise of Congress's undisputed power to make a law that is necessary and proper for the carrying out of its enumerated power to provide for the general welfare of the United States.

IV.

To the extent that the district court held that 18 U.S.C. §666 requires no nexus between the offense conduct and federal funds beyond that required in subsection (b), the judgment of the district court is affirmed. We reverse that part of the district court's judgment finding §666 is facially unconstitutional. We remand this case to the district court for reinstatement of the indictment and for such further proceedings not inconsistent with this opinion.

BYE, Circuit Judge, dissenting.

No one doubts the constitutional authority of Congress to enact criminal laws punishing behavior affecting tangible federal interests. However, when Congress seeks to punish conduct with no connection to federal interests, conduct traditionally punished only by state and local governments exercising their general police powers, Congress exceeds its constitutional authority. The statute we review today, 18 U.S.C. §666(a)(2), punishes a broad swath of conduct bearing little relationship to any federal interest. It establishes federal criminal liability for those who bribe state and local government officials, provided only that the government receives $10,000 per year in federal program benefits. Id. §666(a)(2), 666(b): A briber need not handle, manage, administer or supervise the receipt or disbursement of federal funds, and the purpose of the bribe need not relate to federal program benefits. It is therefore logically and legally untenable to assert a federal interest in punishing these bribers.

In my view, the majority's decision to uphold §666(a)(2) despite this infirmity swims against the tide of governing law. A wave of recent Supreme Court decisions emphasizes

Congress' limited ability to federalize criminal conduct, United States v. Morrison, 529 U.S. 598 (2000), United States v. Lopez, 514 U.S. 549 (1995), and to interfere in matters traditionally left to state governance, Alden v. Maine, 527 U.S. 706 (1999), Printz v. United States, 521 U.S. 898 (1997). These decisions guide my review of §666(a)(2) and require my respectful dissent.

I

I do agree with the majority in one important respect: section 666(a)(2) cannot be justified solely as an exercise of Congress' Spending Clause authority. The majority properly rests this holding upon the absence of any statutory link between the bribe and the state or local government's receipt or use of federal benefits. Because §666(a)(2) does not link the bribe to federal benefits, the statute encompasses and punishes conduct well beyond Congress' ability to "provide for the . . . general Welfare of the United States." U.S. Const. Art. I, §8, cl. 1. Indeed, the statute's breadth leads to absurd results: only by injecting a new element into the statute can a court forestall the conviction of a person who bribes the city meat inspector while the city parks department receives $10,000 in federal benefits. See United States v. Santopietro, 166 F.3d 88, 93 (2d Cir. 1999). The majority wisely rejects the supposed Spending Clause moorings of §666(a)(2).

Had the majority stopped at this point, I would have joined its opinion. The majority continues onward, however, reaching beyond its Spending Clause analysis and "resort[ing] to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." Printz, 521 U.S. at 923. The majority apparently casts aside its earlier qualm that §666(a)(2) requires no connection between the bribe and federal benefits. The majority instead perceives a bare, "rational relationship" between punishing

bribers and maintaining the integrity of federal programs, and on that basis declares the Necessary and Proper Clause a proper font of congressional authority. This may be correct, but it answers only half the question we must decide.

II

In my view, the principal defect in the majority opinion is its inattention to the conjunctive "and" that separates the words "necessary and proper." The majority advances several arguments suggesting §666(a)(2) is "necessary," in the sense envisioned in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420-21 (1819). But the majority fails to ask-let alone resolve-whether the statute is also "proper." This is not merely a semantic dispute, for in Printz and Alden the Supreme Court advanced an interpretation of "proper" that calls into question the constitutionality of federal statutes that trespass upon the domain of state and local legislative power. Section 666(x)(2) is one such statute.

M'Culloch holds that Congress enjoys broad powers to select the means of enacting its objectives. Id. at 421. Thus, in determining whether a law is "necessary," courts must review Congress' law-making efforts with considerable deference. The majority describes this deference in terms of rationality: courts may not demand of Congress anything more than a rational relationship between its chosen means and ends. This reading of M'Culloch is, of course, received wisdom. Applying M'Culloch in this fashion, the majority makes a fairly convincing argument that the "fit" between §666(a)(2) and Congress' underlying objective to preserve the integrity of federal programs is rational. However, because there is a rational relationship between Congress' aim and the law it enacted, under M'Culloch, the law is "necessary." But M'Culloch says very little, if anything, about what makes a

law "proper." That specific question largely evaded the Court's. attention until Printz and Alden.

Printz began bridging this doctrinal gap by drawing upon a law review article that develops a legal and historical distinction between "necessary" laws and "proper" ones. Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267 (1993). Printz rejected the argument that Congress could commandeer state officials to implement certain federal mandates by using its Necessary and Proper Clause power to effectuate its Commerce Clause authority. 521 U.S. at 923-24. Relying solely on its understanding of what constitutes a "proper" law, the Court held the Necessary and Proper Clause forbids Congress from enacting legislation that intrudes on state sovereignty.

> When a "La[w]...for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in [the Constitution,] it is not a "La[w]...proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."

Id. (emphasis in original; internal citations omitted). Like Printz, Alden recognized the word "proper" restricts the scope of legislative power. Alden continued the Court's analysis of "proper" laws by rejecting the argument that the Necessary and Proper Clause conferred authority on Congress to subject unconsenting states to suit in state court "as a means of achieving objectives otherwise within the scope of the enumerated powers." 527 U.S. at 732.

The Court's analysis in Printz and Alden rested entirely upon the propriety of a statute, not whether that statute was

necessary. A law is "proper," the Court maintained, if it respects both the Constitution's limits on federal power and its grants of power to the states and the people. Printz, 521 U.S. at 918-22, 923-24. These cases teach us that a law is "proper" for the enforcement of an enumerated power only if it hews to constitutional principles of limited federal government and state sovereignty. Federal laws that usurp the traditional domain of state authority are therefore not "proper."

I believe §666(a)(2) lies outside the guideposts erected in Printz and Alden for assessing a "proper" law. The statute intrudes upon state and local concerns by federalizing anticorruption law, which is traditionally the domain of state and local legislation. See United States v. Bass, 404 U.S. 336, 349 (1971) ("Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.") (internal citations omitted) (cited in Lopez, 514 U.S. at 561 n.3). Section 666(a)(2) thereby offends the Constitution's basic limitations on federal power. The only possible relationship between §666(a)(2) and federal interests is the sum of $10,000 in federal benefits received each year by state or local governments. There is scarcely any limit to this relationship, however. Even under a narrow view of "federal benefits," Fischer v. United States, 529 U.S. 667, 681(2000), it is beyond dispute that every state-and nearly every county, tribe and city-receives that sum in yearly federal benefits. Moreover, the statute requires no connection between those federal benefits and the bribe. The lack of any connection makes all too real the risk that federal

anticorruption efforts will swamp state and local efforts to combat bribery.

The majority suggests the federal interest in punishing bribery of state and local government officials is at least as great as the federal interest in punishing those who misapply funds belonging to state banks. Westfall v. United States, 274 U.S. 256, 258-59 (1927). But the statute in Westfall included an element establishing a federal interest in every prosecution-the state bank had to be a member of the Federal Reserve System. Misapplication of a bank's funds weakened the entire membership of the Reserve, so the Supreme Court could easily identify the federal interest in protecting each bank's assets. Westfall therefore adds nothing to the majority's argument. If anything, Westfall proves my point: Congress cannot enact criminal laws absent a quantifiable federal interest in punishment.

Both the majority and the Eleventh Circuit in United States v. Edgar, 304 F.3d 1320, 1326 (11th Cir. 2002), sanction this federalization of anticorruption law. They all but admit that once the federal government provides $10,000 in yearly benefits to a state or local government, the federal government obtains an ongoing interest in the entire structure and operations of state and local governments, and in the credibility and integrity of their agents. Congress may, in effect, regulate (in this case, criminalize) many activities that tangentially threaten that structure, credibility or integrity. The real-world effects are truly startling. It is now a federal crime for an auto mechanic to induce a public high school principal to hire him to teach shop class by offering free car repair. This federalization of anticorruption law erodes the Constitution's limits on federal power.

The majority's sweeping view of the Necessary and Proper Clause calls to mind Congress' unbounded

deployment of its Commerce Clause authority before Lopez and Morrison. Both Lopez and Morrison curtailed federal power, forbidding Congress from piling "inference upon inference" to demonstrate a relationship between crimes and federal interests. Lopez, 514 U.S. at 566; Morrison, 529 U.S. at 615. I fear Congress relied upon similarly weak and attenuated inferences in enacting §666(a)(2). For many of the same concerns articulated in Lopez and Morrison, I am troubled by the majority's efforts to interpret the Necessary and Proper Clause to permit the federalization of criminal laws. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." Lopez, 514 U.S. at 577. This is precisely what makes §666(a)(2) not "proper."

I recognize, of course, §666(a)(2) does not preempt state or local power to punish corruption. Even though §666(a)(2) lacks preemptive effect, the sheer size and funding of the federal government's criminal justice machinery suggests the possibility of state and local anticorruption efforts dwindling. It blinks at reality to believe §666(a)(2) does no more than provide an additional weapon in the anticorruption arsenal. By inserting itself into a domain traditionally reserved for state and local prosecutions, the federal government treats state governments, for example, not with the respect and dignity due them as "residuary sovereigns and joint participants in the Nation's governance," Alden, 527 U.S. at 748-49, but as untrustworthy organs incapable of policing their own. The development and enforcement of sound ethical standards, and of political accountability to citizens for failing to do so, lies at the very heart of sovereignty. See Printz, 521 U.S. at 920 ("The Constitution thus contemplates that a State's government will represent and remain accountable to

its own citizens."); New York v. United States, 505 U.S. 144, 168-69 (1992).

Section 666(a)(2) upsets the delicate balance between federal and state authority that animates our Constitution. See id. at 921; Alden, 527 U.S. at 751. "Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else. . . . The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog." United States v. Morgan, 230 F.3d 1067,1074 (8th Cir. 2000) (Bye, J., specially concurring) (quoting David E. Engdahl, The Spending Power, 44 Duke L.J. 1, 92 (1994)).

III

I do not believe §666(a)(2) validly "carr[ies] into [e]xecution" Congress' Spending Clause authority because the statute sweeps within its ambit a wide range of criminal activity bearing little or no relation to federal interests. I am not alone in this view. Even the government disavowed reliance on the Necessary and Proper Clause when the question first arose at oral argument. The government never urged our court to uphold §666(a)(2) on the strength of Congress' Necessary and Proper Clause power, and, when pressed, the government expressed considerable discomfort with such a notion. For the reasons expressed above, I share the government's discomfort with this argument, and therefore respectfully dissent.

A true copy.
Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

Basim Omar Sabri,

Defendant.

Crim. No. 01-246 (RHK/JMM)
MEMORANDUM OPINION
AND ORDER

Michael W. Ward, Assistant United States Attorney, Minneapolis Minnesota for Plaintiff.

Andrew S. Birrell and R. Travis Snider, Birrell & Newmark, Ltd. Minneapolis, Minnesota, for Defendant.

Defendant Basim Omar Sabri is charged in a three-count Indictment[1] with corruptly giving, offering, and agreeing to give things of value to Minneapolis City Council member Brian Herron with the intent of rewarding or influencing Herron in connection with various transactions of the City Council and the Minneapolis Community Development Agency ("MCDA"), all in violation of 18 U.S.C. §666(a)(2). Before the Court is Sabri's Motion to Dismiss the Indictment on the grounds that 18 U.S.C. §666 is unconstitutional on its face. For the reasons set forth below, the Court will grant the Motion.

[1] Sabri has entered pleas of not guilty to each of the counts in the Indictment.

Background

The following facts are alleged in the Indictment. Defendant Sabri is a property developer and landlord in the City of Minneapolis. (Indictment, ¶ l.d.) During 2001, Sabri was pursuing a real estate development project within the Eighth Ward of the City of Minneapolis which involved a hotel and several commercial retail businesses. (Id.) The project contemplated zoning, eminent domain/condemnation, licensing and funding actions by the City of Minneapolis ("the City"), the MCDA and the Minneapolis Neighborhood Revitalization Program (NRP).[2] (Id.) Through July 17, 2001, Herron was a member of the Minneapolis City Council representing the Eighth Ward.[3] (Id. ¶ 1.e.) His committee assignments included the Ways and Means/ Budget, Public Safety and Regulatory Services, and Health and Human Services committees. (Id.) As a member of the City Council, Herron also served as a member of the Board of Commissioners of the MCDA, overseeing the actions and budget of that agency.[4] (Id.)

Count I of the Indictment alleges that, from July 2 through July 17, 2001, Sabri corruptly sought Herron's assistance in obtaining regulatory approvals from the City of Minneapolis for the above-described commercial real estate development project. (Id. ¶ 3.) Sabri allegedly gave or offered Herron $5,000 with the intent to influence or reward him in connection with such transactions. (Id.)

Count II of the Indictment alleges that, from July 2 through July 17, 2001, Sabri corruptly sought Herron's attendance at a meeting with private business owners who owned property necessary for Sabri's commercial development project. (Id. ¶ 5.) Count II also alleges that Sabri corruptly sought Herron's threat at that meeting to use the City's power of eminent domain to take the business owners' property unless they sold to Sabri. (Id.) Sabri allegedly offered or agreed to give Herron $10,000 with the intent of influencing or rewarding Herron for his actions. (Id.)

Count III of the indictment alleges that from July 7 through July 17, 2001, Sabri corruptly sought Herron's assistance in obtaining $800,000 in community economic development grants from the City, the MCDA, and other entities for his commercial real estate development project. (Ld. ¶ 7.) Sabri allegedly offered or agreed to give Herron

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[2] The NRP is an entity formed by the City of Minneapolis and other local governmental entities to provide funding for the economic revitalization of Minneapolis neighborhoods through neighborhood steering committees. The NRP is wholly funded by the MCDA and its affairs are managed by the NRP Policy Board, which includes the Mayor of the City of Minneapolis and members of the Minneapolis City Council. (Indictment ¶ l.c.)

[3] On July 17, 2001, Herron entered a plea of guilty to one count of Extortion Under Color of Official Right in violation of 18 U.S.C. §1951. The conduct underlying the charge to which Herron pleaded guilty involved a different transaction and different individuals than are involved in the Indictment here, and nothing in this Memorandum Opinion and Order affects the validity of the charge against Herron or his plea of guilty. See United States v. Von, 171 F.3d 648, 654 (8th Cir. 1999) (rejecting challenge to constitutionality of 18 U.S.C. §1951).

[4] The MCDA has an Executive Director, appointed by the Mayor of the City of Minneapolis, and is governed by a Board of Commissioners that is composed of the thirteen elected members of the Minneapolis City Council. (Indictment ¶ 1 .b.)

$80,000 (a 10% commission) with the intent of influencing or rewarding Herron in connection with his assistance. (Id.)

During the one-year period beginning January 1, 2001, the City of Minneapolis was expected to receive (and the City Council was expected to administer) approximately $28.8 million in federal assistance. (Id. ¶ 1.a.) During that same one-year period the MCDA was expected to receive and administer federal assistance in the form of Community Development Block Grants and other federal programs of approximately $23 million. (Id. ¶ 1.b.)

Analysis

As noted above, all three counts of the Indictment charge Sabri with violating 18 U.S.C. §666(a)(2). That section provides, in relevant part, that if a local government, or any agency thereof, "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance," see 18 U.S.C. §666(b), then it is a crime against the United States for any person to

> corruptly give[], offer[], or agree[] to give anything of value to any person give with intent to influence or reward an agent of ... a ... local government or any agency thereof, in connection with any business, transaction, or series of transactions of such ... government, or agency involving, anything of value of $5,000 or more.,

18 U.S.C. §666(a)(2).

Sabri argues that the federal statute is unconstitutional on its face because it does not require a connection between the alleged criminal conduct -- the giving or offering of a bribe -- and the federal funds distributed by Congress. Without the requirement of such a connection, Sabri contends, the statute lies outside the scope of Congress's authority to enact laws under the Spending Clause of Article I of the United States Constitution. This Court begins its analysis by construing §666(a)(2) to determine whether it does or does not require a connection between the bribe and the expenditure of federal funds. If the statute does not require such a connection, the Court will then consider whether Congress validly exercised its legislative authority in enacting §666(a)(2).

I. The Essential Elements of Giving, Offering or Agreeing to Give A Bribe in Violation of §666(a)(2)

In Salinas v. United States, 522 U.S. 52, 56-57 (1997), the United States Supreme Court construed the complementary provision of § 666 which makes it a federal offense for an agent of an organization or a state, local, or tribal governmental body or agency that receives more than $10,040 in federal funds in a year to solicit, demand, accept, or agree to accept anything of value with the intent to be influenced or rewarded in connection with any business, transaction, or series of transactions of the entity valued at $5,000 or more. 18 U.S.C. §666(a)(1). Given the parallel wording in the provision criminalizing the taking of a bribe (18 U.S.C. §666(a)(1)(B) and in the provision criminalizing the giving or offering of a bribe (18 U.S.C. § 666(a)(2)), this Court first looks to Salinas for guidance in construing §666(a)(2).

Salinas, a deputy sheriff in Hidalgo County, Texas, was responsible for managing the county jail and supervising the custody of prisoners. 522 U.S. at 55. He accepted bribes from

a federal prisoner housed at the jail pursuant to an arrangement negotiated between the United States Marshals' Service and the county; in exchange for the bribes, the prisoner was permitted "contact visits" with his wife and a girlfriend. Id. Salinas argued to the Supreme Court that, under §666(a)(1)(B) the government must prove, as an element of the crime of taking a bribe, that "the bribe in some way affected federal funds, for instance by diverting or misappropriating them." Id.

In evaluating Salinas' argument, the Supreme Court focused on the clause "[a]ny business, transaction, or series of transactions," which is found both in §666(a)(1)(B) and in §666(a)(2). Reasoning that the word "any" means "any," without qualification, and that "[t]he statute applies to all cases in which an 'organization, government, or agency' receives [$10,000 or more] of benefits under a federal program," id. at 57 (emphasis added) (citing 18 U.S.C. §666(b)), the Court rejected Salinas' proposed statutory construction. The statute's prohibition against accepting a bribe with the intent of being influenced or rewarded in connection with any business transaction or series of transactions "is not confined to a business or transaction that affects federal funds." Id. Indeed, the Supreme Court observed that §666 (a)(1)(B)'s language was "expansive" and "unqualified. . . both as to the bribes forbidden and the entities covered." Id. at 56 (emphasis added).

Also rejected was Salinas' contention that the Supreme Court could not construe §666(a)(1)(B) to apply to bribes having no affect on federal funds without "a plain statement of congressional intent," as required by Gregory v. Ashcroft, 501 U.S. 452 (1991), and McNally v. United States, 483 U.S. 350 (1987). The Supreme Court distinguished Gregory and McNally on the grounds that, "[i]n each of those cases we confronted a statute susceptible of two plausible

interpretations one of which would have altered the existing balance of federal and state power." 522 U.S. at 59. Here, however, "[t]he text of §666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction." Id. at 60 (emphasis added). Accordingly, the Supreme Court held that "as a matter of statutory construction, §666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds." Id. at 61 (emphasis added).

It appears that Salinas did not ask the Supreme Court to address whether §666(a), as construed, was a proper exercise of the legislative powers vested in Congress by Article I of the Constitution. The Supreme Court did decide, however, that the statute was constitutional as applied to the facts of the case. In reaching that conclusion, it observed that the "preferential treatment accorded to [a federal prisoner in the county jail] was a threat to the integrity and proper operation of the federal program." Id. at 60-61.

While the Salinas Court held that §666(a)(1)(B) did not "require the Government to prove that the bribe in question had any particular influence on federal funds," id. at 61, it expressly left open the question of "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." Id. at 59. After Salinas, two federal courts of appeal have concluded that there must be proof of a connection between the bribe and the expenditure of federal funds.[5] This Court evaluates each appellate court decision in turn.

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[5] By contrast, the United States Court of Appeals for the Sixth Circuit held that §666 "requires no relationship between the illegal activity and the federal funding." See United States v. Dakota, 197 F.3d 821, 826 (6th Cir. 1999). In reaching this

The Second Circuit Court of Appeals in
United States v. Santpietro

In United States v. Santopietro, 166 F.3d 88 (2d Cir. 1999), cert. denied, 510 U.S. 1092 (1994), the Government appealed from a revised sentence that the district court had imposed on Santopietro after vacating his conviction for crimes charged under §666. Santopietro, 166 F.3d at 90. Santopietro, formerly the Mayor of Waterbury, Connecticut had been charged with violating §666(a)(1)(B) by engaging in "a scheme whereby [he] used his political position to influence decisions by various city agencies in return for bank loans and cash payoffs from certain local businessmen." Id. at 91. Santopietro used his influence to further the interests of various real estate developers and accepted both rewards for having used his influence and inducements to use his influence. Id. During the operation of this scheme, the City of Waterbury received substantial federal funds for housing, urban development and other programs within the purview of the land use board, the water department, the zoning commission, and the fire marshal. Id. at 93. "Although large amounts of money flowed to individuals through corrupt means, there was no obvious or direct financial loss to the City of Waterbury itself." Id. at 91.

Prior to the Supreme Court's decision in Salinas, the Second Circuit had held that "the $5,000 or more required to be involved in the transaction must be worth at least that amount to a recipient of federal funds." United States v. Foley, 73 F.3d 484, 492-93 (2d Cir. 1996). The Santopietro court acknowledged that, in light of Salinas,

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conclusion however, the Sixth Circuit did not engage in any extended analysis of either the statute or the Salinas decision.

> to whatever extent Foley required that the bribe directly affect the disbursement or other use of federal funds, such a construction of the statute must now be discarded. Equally to be cast aside is a construction of the statute that imposes limitations on the "anything-of-value" element, beyond the requirement that the transaction, in connection with which the accepter of corrupt payments intended to be influenced, involves anything of value of $5000 or more. Thus, to the extent that Foley required the Government to plead and prove that the transaction involved something of value to the governmental entity that received the requisite amount of federal funds, that narrowing construction of the statute must also be discarded.

166 F.3d at 92-93 (emphasis in original).

Evaluating whether Santopietro's conviction under 666(a)(1) was permissible after the Supreme Court's decision in Salinas, the Second Circuit first discussed the statutory requirements of the offense: the court of appeals observed that the City of Waterbury had received more than $10,000 in the relevant years and the corrupt transactions had exceeded $5000 in value. It then evaluated a "requirement of Foley" that it concluded had survived the Supreme Court's holding in Salinas "that the transaction sought to be influenced had some connection with a federal program." Id. at 93 (citing Foley, 73 F.3d at 493). In considering this "requirement" -- based on its own prior decision in Foley rather than the text of the statute -- the Second Circuit reasoned that [i]ndeed, Salinas may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied." Id. Applying this "requirement" from Foley, the Second Circuit found that because

> federal funds were received by Waterbury for housing and urban development programs and the corrupt payments concerned real estate transactions within the purview of the agencies administering federal funds, the requisite connection between the bribes and the integrity of federally funded programs is satisfied.

166 F.3d at 93.

The Third Circuit Court of Appeals in United States v. Zwick

In United States v. Zwick,199 F.3d 672 (3d Cir. 1999), the defendant, an elected member of a township board of commissioners, appealed from his conviction or bribery under §666(a)(1)(B). Zwick, 199 F.3d at 675. Zwick argued that the trial court misinterpreted §666 when it upheld his conviction without proof of a connection between the solicitation and taking of bribes and federal funds or programs. Id. at 675-76.

Before analyzing the issue raised by Zwick on appeal, the Third Circuit reviewed the case law that had developed around §666.

> Prior to the enactment of §666 in 1984, the limited scope of the federal bribery statute and general theft of property statute hampered the federal government's efforts to reach crimes affecting federal interests due to tracing requirements and limitations on application to non-federal employees. See 18 U.S.C. §§201, 641. By its terms, §666 fills these particular voids; it imposes no title or tracing requirements and covers non-federal employees.

Id. at 679 (emphasis added). With respect to the case law construing §666 prior to Salinas, the court of appeals: observed that some courts had been reluctant to uphold convictions under §666 where there was no proof of a federal

interest in the corrupt act; these courts had reasoned that "interpreting §666 to have no federal interest requirement would make a federal offense out of routine local bribery, dramatically changing the state-federal balance without an express Congressional directive that it intended to do so." Id. at 680. After reviewing the Salinas decision, the Third Circuit discussed the post Salinas split in authority that had emerged regarding whether the government must prove, in a prosecution under §666, that a federal interest was implicated by the corrupt acts. Id. at 681-82.

The Third Circuit began its analysis with the statutory language itself and concluded that "[t]he language does not state explicitly that the government must show a connection between the bribe and federal interests." Id. at 682. Finding no requirement of such a connection in the plain language of §666(a)(1)(B), the Third Circuit turned to the statute's title -- "Theft or bribery concerning programs receiving Federal funds"-- finding that the title "implies that a federal connection is anticipated." Id. The Third Circuit thus concluded that §666(a)(1)(B) was ambiguous, presenting two alternative interpretations:

> The most literal interpretation -- that the statute lacks a federal connection requirement -- is troubling from an interpretative standpoint in that it broadens the range of activity criminalized by the statute and alters the existing balance of federal and state powers by encompassing acts already addressed under state law in which the federal government may have little interest. We cannot embrace such a-. broad reading of this criminal law unless that is the clear directive from Congress.

Id. at 682-83. The Zwick court therefore turned to the legislative history for guidance as to Congress's intent and

concluded that Congress did not intend "to make §666 applicable when no federal interest is implicated by certain offense conduct." Id. at 686. Before reaching its holding "that §666 requires that the government prove a federal interest is implicated by the defendant's offense conduct," id. at 687, the Third Circuit observed that

> [i]nterpreting §666 to have no federal interest requirement produces serious concerns as to whether Congress exceeded its power under the Spending Clause in enacting this statute. To pass muster under the Spending Clause, legislation regulating behavior of entities receiving federal funds must, among other things, be based upon a federal interest in the particular conduct. Applying §666 to offense conduct, absent evidence of any federal interest would appear to be an unconstitutional exercise of power under the Spending Clause.

Id. at 687 (internal citations omitted). The Third Circuit therefore justified its holding on the grounds that, "when a statute is unclear, we will construe it so as to avoid constitutional concerns, assuming that such construction does not amount to a rewriting of the statute." Id.

> ***The essential elements of the crime defined in §666(a)(2) do not include proof of a connection between the offense conduct and the expenditure of federal funds.***

The Eighth Circuit Court of Appeals has not addressed whether a prosecution under §666 requires proof of a connection between the giving or taking of bribes and the federal government's expenditure of funds and, if so, the nature of that connection. Judge Kermit Bye, however, recently considered the Zwick and Santopietro opinions and

found the approach taken by those courts to be "fundamentally flawed." United States v. Morgan, 230 F.3d 1067, 1072-73 (8th Cir. 2000) (Bye, J., concurring). The Second and Third Circuits clearly sought to avoid the constitutional problems they perceived with what the Supreme Court had described as §666's "expansive, unqualified language, both as to the bribes forbidden and the entities covered." Salinas, 522 U.S. at 56. Judge Bye described the Zwick and Santopietro opinions as "reading into" the text of §666 the requirement of a "connection" not found in the language of the statute itself. Morgan, 230 F.3d at 1073. He further observed that the actions of the Second and Third Circuits are contrary to the Supreme Court's repeated admonitions that

> [c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language. This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.

Id. (quoting United States v. Albertini, 472 U.S. 675, 680 (1985) which is quoted in Salinas, 522 U.S. at 57 & 59-60). Judge Bye's analysis and criticisms of Zwick and Santopietro are well-founded.

The Salinas Court admonished that "[n]o rule of construction . . . requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope." Salinas, 522 U.S. at 59 (quoting United States v. Raynor, 302 U.S. 540, 552 (1938)). That, however,

is precisely what the courts of appeals in Zwick and Santopietro did. The Third Circuit in Zwick focused on the statute's title to find an ambiguity that would justify using §666's legislative history to fashion a connection requirement for the statute, which is silent in that regard.[6] This approach fails to take into account a long-standing principle of statutory construction that a title cannot control the plain words of the statute.[7] See 2A J.G. Sutherland, Statutes and Statutory Construction §47.03 (1st ed. 1891). The Third Circuit also sidestepped the Salinas Court's conclusions that the clause "any business, transaction, or series of transactions" is unambiguous, and the term "any" is without limitation. Furthermore, the court of appeals in Zwick did not address the fact that the text of §666(a)(1)(B) does not mention programs of an organization, state, local, or tribal government, or governmental agency that receive federal funding. The only limitation on the statute's application, set out in §666(b), is that the entity whose business the bribe was intended to influence must receive more than $10,000 in a year from a federal program. Under Salinas §666(a)(1)(B) cannot be restricted to bribes tending to influence the "business, transaction, or series of transactions" of programs receiving federal funding. The Third Circuit's reading of §666(a)(1)(B) strains the plain meaning of the words and excludes from the scope of the statute conduct that clearly falls within it.

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[6] The Supreme Court in Salinas, while briefly discussing the historical context surrounding the enactment of §666, did not rely upon the legislative history to construe the statute.

[7] This Court further notes that the Supreme Court, in Salinas, did not consider the title of §666 in construing the statute. It focused solely on the text of §666(a)(1)(B) and found the relevant language to be unambiguous.

The Second Circuit in Santopietro derived its "connection" requirement -specifically, that the transaction to be influenced have some connection with a federal program -- from its pre-Salinas holding in United States v. Foley. The Second Circuit also focused on the fact that the Salinas Court had indicated that the offense conduct there, the bribes received by the deputy sheriff from the federal prisoner, had posed a "threat to the integrity and proper operation of a federal program." It thereby avoided the question of

> whether Santopietro's role as mayor --the chief executive officer of the city and hence the officer ultimately responsible for all city departments -- would render the statute applicable to corrupt payments received by him for an transaction involving the city, even though the federal funds were received for a program entirely unrelated to the program in connection with which the corrupt payments were made.

Santopietro, 166 F.3d at 94 n.3 (emphasis added). This footnote again does not account for the fact that the Salinas Court had construed the clause "any business transaction or series of transactions" to be unqualified. Indeed, according to the Supreme Court, "[]the statute applies to all cases in which an 'organization, government, or agency' receives [$10,000 or more] of benefits under a federal program." Salinas, 522 U.S. at 57 (emphasis added). Section 666(a)(1)(B), as construed by Salinas, applied to Mayor Santopietro for bribes tending to influence any transaction of City of Waterbury, so long as the city received $10,000 or more of benefits under a federal program. Recognizing that such a reading would present constitutional problems, however, the Second Circuit read into the statute a "connection" requirement not found in the text itself.

This Court is not persuaded by these two appellate court decisions, which read a "connection" requirement into the essential elements of a charge under §666. The text of §666(a)(2) cannot support the existence of a "connection" requirement as one of the elements of the offense without qualifying the word "any" in the phrase "in connection with any business, transaction, or series of transactions" -- a phrase the Supreme Court has determined to be unqualified and unambiguous. Therefore, the essential elements the government must prove in order to convict a defendant of giving, offering or agreeing to give a bribe to influence an agent of an organization, government, or governmental agency in violation of §666(a)(2) are as follows:[8]

1. The defendant offered or gave a thing of value to another person;

2. The thing of value was offered or given in connection with any business, transaction, or series of transactions of an organization, or of a local government, or any agency thereof;

3. The business, transaction, or series of transactions in question involves something valued at $5000 or more;

4. The defendant intended the thing of value to influence or reward an agent of such organization, government, or governmental agency in connection with the business, transaction, or series of transactions in question; and

[8] These elements of the offense are consistent with the proposed jury instructions submitted by the government for use in this case. See also Eighth Circuit Model Criminal Jury Instruction 6.18.666B and 6.18.666C (2002)

5. The organization, government, or governmental agency in question received, in any one year period, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of federal assistance.

Because §666(a)(2) does not require the government to prove a connection between the offense conduct and the expenditure of federal funds,[9] the remaining issue is whether the statute, as now construed by this Court, is a constitutional exercise of Congress's powers under the Spending Clause.

II. The Constitutionality of §666(a)(2) under the Spending Clause

Federal courts are courts of limited jurisdiction, possessing only such powers as are authorized by the Constitution and by Acts of Congress. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). The power of Congress to enact legislation is limited to the enumerated powers found in Article I of the Constitution. See generally New York v. United States, 505 U.S. 144, 1158-59 (1992) (discussing constitutional limitations on Congress's power to legislate). The Spending Clause in Article I authorizes Congress to spend federal funds "to provide for the general Welfare of the United States." U.S. Const. Art. I, §8, cl. 1. The government argues that (a) the statute itself, in §666(b), confers federal jurisdiction for prosecution and (b)

[9] Therefore, the government's argument in its opposition memorandum that it could establish a connection between the bribes allegedly offered by Sabri and the expenditure of federal funds is irrelevant. The statute does not require proof of such a connection in order for the government to establish that a crime, as defined in §666, has been committed.

Congress has properly enacted §666 under the Spending Clause.[10]

The government argues that §666(b) -- which states that the statute applies whenever an organization, state, local, or tribal government, or governmental agency in question has received at least $10,000 from a federal program -- constitutes an "express jurisdictional element" that confers federal court jurisdiction over the offenses described in §666.[11] See United States v. Lopez, 514 U.S. 549 561 (1995). In Lopez, the Supreme Court considered whether the Gun-Free School Zones Act of 1990 was unconstitutional because it had been enacted outside the scope of Congress's powers under the Commerce Clause. 514 U.S. 559-67. In determining the Act's constitutionality, the Court evaluated whether 18 U.S.C. §922(q) contained a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id. at 561. The Supreme Court concluded that §922(q) had "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Id. at 562 (emphasis added).

Similarly, §666 does not require that the offense conduct (in this case, the giving or offering of bribes) have an effect on the federal funds disbursed to local government. Salinas, 522 U.S. at 60-61. There is no statutory element, as established above, that requires proof on a case-by-case basis that the alleged bribery has an explicit connection to any federal funds distributed to the receiving entity. The Third Circuit in Zwick correctly pointed out that §666 "imposes no title or tracing requirements." 199 F.3d at 679. Section 666 is plainly distinguishable from other criminal statutes containing an "express jurisdictional element"; section 666(b) does not directly link a defendant's wrongdoing to the subject over which Congress has power -- the expenditure of federal funds. See generally, George D. Brown, Stealth Statute - Corruption, the Spending Power, and the Rise of 18 U.S.C. §666, 73 Notre Dame L. Rev. 247, 293-94 (Jan. 1998). The Court rejects the government's argument that §666(b) is an "express jurisdictional element" that limits the statute's reach and constitutes a proper conferral of federal jurisdiction.

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[10] The government has not argued that Congress enacted §666 pursuant to the exercise of legislative power under the Commerce Clause; therefore, this Court will not consider that issue.

[11] The government's assertion that §666(b) limits the statute's applicability to "entities receiving a threshold amount of federal funding and to agents of those entities receiving federal funds," (Gov't Br. at 3-4), seriously mischaracterizes the statute. The criminal provisions of §666(a) are triggered whenever an organization, or a state, local, or tribal government, or any agency thereof, receives at least $10,000 in federal funds in a year. 18 U.S.C. §666(b). The statute applies, however, not only to agents of the entity receiving the funds, 18 U.S.C. §666(a)(1), but also as the Indictment in this case against Sabri demonstrates, to any person offering something of value with the intent of influencing or rewarding an agent of the entity receiving the federal funds in connection with any business of that entity. 18 U.S.C. §666(a)(2). Nor does §666(a)(2) require the agent to be the direct recipient of the bribe; under that provision, it is a crime to offer something of value to any other person with the intent of influencing or rewarding an agent of the entity receiving the government's funds.

The government also argues that, under South Dakota v. Dole, 483 U.S. 203 (1987), §666 is a valid exercise of legislative power under the Spending Clause because it is merely a "condition" which Congress may attach (incident to its spending power) on an entity's receipt of federal funds. In Dole, the Supreme Court held that Congress could indirectly bring about the establishment of a uniform minimum drinking age among the States by enacting a statute that directed the Secretary of Transportation to withhold a small percentage of federal highway funds from those States allowing the purchase or possession of alcohol by individuals under twenty-one years of age. 483 U.S. at 206. "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal. statutory and administrative directives." Id. The Dole Court recognized, however, that Congress's power under the Spending Clause is subject to several general restrictions, including limitations that (1) the power must be used in pursuit of the general welfare; (2) Congress must state the condition it is placing on the federal funding unambiguously; (3) the conditions must be related to the federal interest in particular national projects or programs; and (4) the conditions must not violate other independent constitutional restrictions. Id. at 207-08.

This Court finds unpersuasive the government's argument that Congress's enactment of §666 is justified under the standard announced in Dole. As a threshold matter, §666 is not really a "condition" statute. Congress clearly stated the conditions upon which States could receive all of the available federal highway funds. See Dole, 483 U.S. at 208 (citing 23 U.S.C. §158). Section 666, however, does not similarly condition a state or local government, or governmental agency's, receipt of federal funds. Section 666 "neither requires a state's compliance with federal regulatory

or administrative directives, nor prevents state action." United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y.1995). Furthermore, the statute does not apply to the recipient government or organization; it applies to the "agents" of the recipient and private parties.

The Supreme Court has long observed that congressional power under the Spending Clause is similar to the power existing between parties to a contract.

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."

Pennhurst, 451 U.S. at 17. The government's contention that "[a] local government may easily remove its officers and agents from coverage under 18 U.S.C. §666 by simply declining any federal aid or only accepting de minimus aid" (Gov't's Br. at 7) would suggest that there is some sort of contractual quid pro quo supporting the enactment of §666 under the Spending Clause. The argument in fact demonstrates that §666 is an "unbargained-for" intrusion into state criminal jurisdiction.

In Dole, South Dakota stood to lose only "5% of the funds otherwise obtainable under specified highway grant programs" if it adhered to a minimum drinking age of nineteen. Dole, 483 U.S. at 211 (emphasis added). Given the small percentage of funds at stake, the Dole Court had found the state's arguments that the highway funding statute was "coercive" to be mere rhetoric. Id. The "choice" posed by the government here is much more dire. To cut the "string" of

§666, the City of Minneapolis must decide to forego approximately 99.97% of the federal funds[12] it otherwise obtains annually through federal programs.[133] Similarly, the MCDA must decide to forego approximately 99.96% of the federal funds[144] it otherwise obtains annually through federal programs in order to untangle itself from the "string" of §666. Thus, even if one could describe the federal funds disbursed to the City of Minneapolis and MCDA as the "financial inducement" by which Congress bargained for federal jurisdiction over offenses traditionally within the purview of state and local governments, that bargain surely is "so coercive as to pass the point at which pressure turns into compulsion." Dole, 483 U.S. at 211.

Section 666 plainly is not a "condition" statute within the reasoning of Dole and cannot be justified under that decision

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[12] That percentage represents all but $10,000 of the $28.8 million in federal funding the City received during calendar ear 2001. (See Indictment ¶ l. a.)

[13] Even if the City of Minneapolis or the MCDA made that "simple" decision such a course of action would not immediately remove anyone from the scope of §666; the "one year period" for determining whether the statutory minimum amount of federal funds have been received begins no earlier than twelve months before the commission of the offense and extends no later than twelve months after the commission of the offense. See 18 U.S.C. §666(d)(5). Thus, long after the federal funds had been cut off, the City. and the MCDA could still find both their "agents" and third parties subject to federal criminal prosecution.

[14] This percentage represents all but $10,000 of the $23 million in federal funds the MCDA allegedly received during calendar year 2001. (See Indictment ¶1. b.)

as a valid exercise of Congress's power under the Spending Clause.[15] Viewing §666 in light of Dole and Pennhurst, Judge Bye has observed that

> Congress did not contract with states or local governments. Neither did Congress bestow gifts of funds upon those governments. Rather, Congress passed a federal criminal statute designed to punish conduct that falls within the domain of traditional state concerns (bribery, embezzlement, fraud, etc.). Section 666 reaches beyond punishment of the state and local governments who receive those funds to proscribe the conduct of third persons who aren't parties to the funding contract.

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[15] If §666 were a condition statute, it would not appear to satisfy the relatedness limitation on legislative power under the Spending Clause. That limitation requires that the condition Congress imposes on the federal funds must bear some relationship to the purpose of the federal spending. See New York v. United States, 505 U.S.144, 167 (1992); Dole, 483 U.S. at 207-08. The government argues that the purpose of §666 is to protect the "integrity of organizations or agencies that receive federal funds." (Gov't Br. at 4.) Such a connection between the federal spending and the enactment of §666 is too attenuated since, under that rationale, the government could prosecute a city meat inspector for taking bribes of over $5000 (thereby compromising the integrity of city government) even if the inspector has no contact with or control over funds received by the city from the federal government.

Morgan, 230 F.3d at 1074 (emphasis added). This Court finds Judge Bye's observations about the Spending Clause shortcomings of §666 to be germane and persuasive.[16]

"Under our federal system, the states possess primary authority for defining and enforcing the criminal law." Lopez, 514 U.S. at 561 n.3 (internal quotation marks omitted). The Minnesota Legislature has declared it a felony to give, offer, or promise to give to any public officer or public employee,[17] either directly or indirectly, any benefit, reward, or consideration to which that officer or employee is not legally entitled with the intent of influencing that person's performance of his or her powers or duties. Minn. Stat. §609.42. The federal punishment of the same conduct under §666(a)(2) is an intrusion into the state's primary authority and is based solely upon a state or local governmental entity's receipt of a modest amount of federal funds. The following passage, quoted in Morgan, has resonance here:

[16] For purposes of Minnesota's bribery statute, a "public officer" is defined to include "a member of the legislature or of a governing board of a county, municipality, or other subdivisions of the state, or other governmental instrumentality within the state." Minn. Stat. §609.415, subd. l (1)(b). A "public employee" is defined as "a person employed by or acting for the state or a county, municipality, or other subdivision or governmental instrumentality of the state for the purpose of exercising their respective powers and performing their respective duties, and who is not a public officer." Id., subd. 1(2).

[17] The constitutional deficiencies this Memorandum Opinion and Order has discussed with respect to 18 U.S.C. §666(a)(2) have no application to Minnesota's bribery statute.

> . . . Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else. Federal dominion over federal property is irrelevant, because once any particular funds have been given to a recipient, those funds are not federal property anymore. The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog.

Morgan, 230 F.3d at 1074 (quoting David E. Engdahl, The Spending Power, 44 Duke L.J. .1, 92 (Oct. 1994)) (emphasis added in concurring opinion). Without a requirement that the government prove that the alleged bribery has some connection to the federal funds disbursed by Congress, which this Court has determined is not present in the statute, 18 U.S.C. §666(a)(2) is an unconstitutional exercise of Congress's power under the Spending Clause. Accordingly, the Indictment here, based solely on §666(a)(2), must be dismissed.

Conclusion

Section 666(a)(2) does not require proof by the prosecution of a connection. between the offense conduct and the expenditure of federal funds. Section 666 does not contain an "express jurisdictional requirement" that limits the statute's reach to cases in which the alleged bribery has an explicit connection to any federal funds distributed to the receiving entity. Thus, it does not contain a proper conferral of federal jurisdiction, as discussed in United States v. Lopez, 514 U.S. 549 (1995). Nor does §666 impose a "condition" on the grant of federal funds, as discussed in South Dakota v. Dole, 483 U.S. 203 (1987). Therefore, §666(a)(2) is an unconstitutional exercise of Congress's legislative power under the Spending Clause of Article I of the United States Constitution.

Based on the foregoing, and all of the files, records and proceedings herein, IT IS ORDERED that Defendant Basim Omar Sabri's Motion to Dismiss the Indictment Because 18 U.S.C. §666 is Unconstitutional (Doc. No. 43) is GRANTED. The Indictment (Doc. No. 1) is hereby DISMISSED.

January 2002
s/RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	INDICTMENT
Plaintiff,	)	18 U.S.C. §666(a)(2)
v.	)	
BASIM OMAR SABRI,	)	
Defendant.	)	

THE UNITED STATES GRAND JURY CHARGES THAT:
1. At all times material to this Indictment:

a. The City of Minneapolis is a local government within the State and District of Minnesota. The City of Minneapolis received, and the City Council administered, federal assistance in excess of $10,000 (approximately $28.8 million) during the one year period beginning January 1, 2001. The budgetary, business, regulatory and governmental affairs of the City of Minneapolis are governed by a Mayor and 13 member City Council.

b. The Minneapolis Community Development Agency (MCDA) is an entity created by the Minneapolis City Council to fund housing and economic redevelopment within the City of Minneapolis. The MCDA and its programs are financed in part by federal assistance in the form of Community Development Block Grants and other federal programs in excess of $10,000 (approximately $23 million) in the one year period starting January 1, 2001. The MCDA has an Executive Director appointed by the Mayor and the MCDA is governed by a Board of Commissioners which is composed of the thirteen elected members of the Minneapolis City Council.

c. The Minneapolis Neighborhood Revitalization Program (NRP) is an entity formed by the City of Minneapolis and other local governmental entities to provide

funding for the economic revitalization of Minneapolis neighborhoods through neighborhood steering committees. The Minneapolis NRP is wholly funded by the MCDA and its affairs are managed by the NRP Policy Board which includes the Mayor and members of the Minneapolis City Council.

d. Defendant BASIM OMAR SABRI is a businessman doing business within the City of Minneapolis as a property developer and landlord. Sabri Properties, Inc. is a business owned or controlled by the defendant and doing business within the City of Minneapolis. From before May 2001 through at least July 17, 2001, defendant SABRI was pursuing a proposed real estate development project located at 2nd Avenue and Lake Street within the Eighth Ward of the City of Minneapolis. The proposed project involved both a hotel and commercial retail concerns and the proposal contemplated zoning, eminent domain/condemnation, licensing and funding actions by the City of Minneapolis, the MCDA and the NRP.

e . From 1993 through July 17 , 2001, BRIAN CURTIS HERRON was a member of the Minneapolis City Council representing the Eighth Ward. HERRON's council committee assignments included the Ways and Means/Budget, Public Safety and Regulatory Services and Health and Human Services committees. As a member of the Minneapolis City Council, HERRON also was appointed to serve as a member of the Board of Commissioners overseeing the actions and budget of the MCDA. As a member of the Minneapolis City Council and the MCDA, HERRON was an agent of the City of Minneapolis and the MCDA.

COUNT 1

(Corruptly Offering/Giving Something of Value to an Agent of Local Government)

2 . The grand jury realleges paragraph 1 as though reasserted in full.

3. From on or about July 2, 2001 through July 17, 2001, in the State and District of Minnesota, the defendant,

BASIM OMAR SABRI,

did corruptly give, offer and agree to give a thing of value, namely $5,000, to BRIAN CURTIS HERRON with the intent to influence and reward HERRON, who was an agent of the City of Minneapolis and the MCDA, for HERRON's assistance in obtaining regulatory approvals from the City of Minneapolis that were necessary for a commercial real estate development project then being pursued by defendant SABRI, such business, transactions, or series of transactions involving something of value of over $5,000; all in violation of Title 18, United States Code, Section 666(a)(2) .

COUNT 2

(Corruptly Offering/Promising Something of Value to an Agent of Local Government)

4. The grand Jury realleges paragraph 1 as though reasserted in full.

5. From on or about July 2, 2001 through July 17, 2001, in the State and District of Minnesota, the defendant,

BASIM OMAR SABRI,

did corruptly offer and agree to give a thing of value, namely, $10,000, to BRIAN CURTIS HERRON with the intent to influence and reward HERRON, who was an agent of the City of Minneapolis and the MCDA, in return for HERRON's attendance at a meeting with private business owners HERRON's threat to use eminent domain to take their

property if they did not sell to SABRI which property was necessary for defendant SABRI's commercial development project and such business, transactions, or series of transactions involving something of value of over $5,000; all in violation of Title 18, United States Code, Section 666(a)(2).

COUNT 3

(Corruptly Offering/Promising Something of Value to an Agent of Local Government)

6. The grand jury realleges paragraph 1 as though reasserted in full.

7. From on or about July 7, 2001 through July 17, 2001, in the State and District of Minnesota, the defendant,

BASIM OMAR SABRI,

did corruptly offer and agree to give a thing of value, namely, $80,000, to BRIAN CURTIS HERRON with the intent to influence and reward HERRON, who was an agent of the City of Minneapolis and the MCDA, as a 10% commission and in return for HERRON's obtaining $800,000 in community economic development grants from the City of Minneapolis, MCDA and other entities for defendant SABRI's commercial real estate development project, such business, transactions or series of transactions involving something of value of over $5,000; all in violation of Title 18, United States Code, Section 666(a)(2).

A TRUE BILL
s/UNITED STATES ATTORNEY
s/FOREPERSON